Publix Super Markets, Inc. ***and*** **United Food & Commercial Workers International Union**[1] ***and*** **United Food & Commercial Workers Local 1625** ***and*** **Tarvis Hooks** ***and*** **Joaquin Garcia** ***and*** **Edgar Linarte.** Cases 12–CA–21391–3, 12–CA–21391–4, 12–CA–21495–7, 12–CA–21553–3, 12–CA–21958, 12–CA–22174, 12–CA–22277–2, 12–CA–22277–3, 12–CA–20429, 12–CA–22059, 12–CA–21172–1, 12–CA–21172–2, and 12–CA–21228

August 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On August 28, 2003, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order,[3] and to adopt the Order as modified[4] and set forth in full below.

Introduction

The unfair labor practices alleged in this case arose out of the Union's long-term, off-and-on campaign to represent the Respondent's warehouse employees. The events at issue occurred during the period from June 1999 through May 2002.

For the reasons discussed below, we unanimously agree: (1) to adopt the judge's findings of various 8(a)(1) violations that were not excepted to; (2) to reverse the judge's finding of an 8(a)(1) violation that was based on precedent that has since been overruled; (3) to adopt the judge's finding that the Respondent violated Section 8(a)(1) by applying its bulletin board policy in a disparate manner; (4) to adopt the judge's finding that the Respondent violated Section 8(a)(1) by threatening to discipline and/or discharge employees Joaquin Garcia and Tarvis Hooks for engaging in concerted activity; and (5) to adopt the judge's finding that the Respondent violated Section 8(a)(3) by disciplining, and ultimately discharging, employee Luis Pacheco.

Chairman Battista and Member Liebman also agree with the judge's finding that the Respondent violated Section 8(a)(1) by threatening to discharge Pacheco for engaging in union activities. (Member Schaumber separately dissents on this issue.) Chairman Battista and Member Schaumber, however, reverse the judge's finding that the Respondent violated Section 8(a)(1) by asking employees to report other employees' union activities. (Member Liebman separately dissents on this issue.)

A. The 8(a)(1) Allegations

The Respondent excepts to a number of unfair labor practices found by the judge, but it does not present any argument or grounds for disputing the judge's findings. Specifically, the judge found that the Respondent violated Section 8(a)(1) by the following conduct:

(1) Supervisor Alvin Pratt's threats, in late July or early August 1999, that the plant would close and/or that the work would be removed if the employees selected the Union as their bargaining representative;

(2) Department Head Desmond Tice's threats, about late July 1999 and again about September or October 1999, to deny employment opportunities (specifically, the opportunity to transfer to truckdriver positions) if the employees selected the Union as their bargaining representative;

(3) Supervisor Luis Funes' threats, in mid-October 2001, of discharge and unspecified reprisals because employees filed a lawsuit regarding terms and conditions of employment;

[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO on July 29, 2005.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we find that the Respondent's contentions are without merit.

[3] We find it unnecessary to pass on the judge's finding that various statements made during the latter part of December 2001 by Distribution Manager Jack Mosko and Labor Relations Manager Mark Codd constituted threats that employees would lose jobs and benefits if they selected the Union as their bargaining representative. These findings are cumulative of other violations we have affirmed in this case and would not materially affect the remedy.

[4] We shall modify the judge's recommended Order both to comport with the violations found herein and in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Ferguson Electric Co., Inc.*, 335 NLRB 142 (2001).

(4) Various unnamed security guards' prohibition, since mid-November 2001, on prounion employees parking in the Respondent's lot while handbilling;[5]
(5) Funes' threats, about February 7, March 12, and May 29, 2002, of discharge because of employees' union activities, and his creation of an impression of surveillance;
(6) Department Manager Josue Cardona's and Assistant Department Head Keith Hankerson's threats, about December 2001, that employees would lose the ability to adjust grievances with their supervisors if the employees selected the Union as their bargaining representative; and,
(7) Human Resource Investigator Tanya Brown's denial, on May 27, 2002, of employee Joaquin Garcia's request for a coworker representative at an investigatory interview.

With the exception of the last of these allegations, we adopt these findings in the absence of argument.[6] Section 102.46(b)(2) of the Board's Rules ("Any exception . . . not specifically urged shall be deemed to have been waived."). See, e.g., *Elevator Constructors Local 91 (Otis Elevator Co.)*, 345 NLRB 925 fn. 2 (2005).

Even in the absence of specific argument, however, we reverse the judge's finding that the Respondent violated the Act by denying Garcia's request for a coworker representative at an investigatory interview. The judge found the violation by applying *Epilepsy Foundation*,[7] which extended *Weingarten*[8] to unrepresented employees, entitling them, on request, to have a coworker representative present at investigatory interviews that they reasonably believe could lead to discipline. However, *Epilepsy Foundation* was overturned in *IBM Corp.*, 341 NLRB 1288 (2004). Because, under our current law, Garcia was not entitled to a coworker representative during his investigatory interview, we cannot find that his rights were violated when Brown denied his request for such a representative. Thus, in light of *IBM Corp.*, we hold that the Respondent's refusal to grant Garcia's request for a representative did not violate the Act.

The judge correctly found that, during the summer of 1999, the Respondent violated Section 8(a)(1) by applying its bulletin-board posting policy in a disparate manner. Relying on *Hale Nani Rehabilitation & Nursing*, 326 NLRB 335, 336 (1998), in which the Board permitted an employer to engage in literature distribution on its property while prohibiting employee distribution, the Respondent contended that it permitted only production information and other work-related postings by its managers.[9] Nevertheless, the judge credited testimony that employees repeatedly posted offers to sell personal items like homes and cars, and that such postings were not removed. In light of this evidence, the judge rejected the Respondent's argument that its policy was similar to that of *Hale Nani,* supra. In these circumstances, we agree with the judge that the Respondent acted unlawfully by disparately removing prounion postings from its bulletin boards.[10] See *Holly Farms Corp.*, 311 NLRB 273, 274 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995); *Bon Marche*, 308 NLRB 184, 185 (1992).

The judge also found that the Respondent, through Mosko, violated Section 8(a)(1) by threatening to discipline and/or discharge employees Joaquin Garcia and Tarvis Hooks for engaging in protected concerted activity. As set out in greater detail in the judge's decision, Mosko informed Garcia and Hooks that they would be disciplined (and could be discharged) for dishonesty, because he believed that they had lied to their supervisor, Jose Diaz, about their reasons for wanting to leave their workstations and meet with Mosko. However, the record shows—and the Respondent concedes—that they never misrepresented that their actual purpose was to accompany and serve as witnesses to their coworker Jefferson Jules' conversation with Mosko about his work hours. We affirm the judge's conclusion that their actions in support of Jules were protected, regardless of whether the Respondent had a duty to allow them to attend that meeting. As a result, Mosko's further investigation of Garcia's and Hooks' suspected misrepresentation was based on no more than an incorrect assumption that their purpose was rather to discuss an unrelated overtime pol-

[5] In finding this violation, we rely on the fact that the no-parking rule was disparately applied to prounion handbillers. We do not pass on whether union agents who were not employed by the Respondent had a right to be on its property.

[6] Further, the Respondent's exceptions to these findings are based on the Respondent's disagreement with the judge's credibility determinations. As stated in fn. 2, supra, we find no basis for reversing the credibility findings.

[7] *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), enfd. in relevant part 268 F.3d 1095 (D.C. Cir. 2001), cert. denied 536 U.S. 904 (2002).

[8] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

[9] The Respondent does not deny that it removed prounion materials from its bulletin boards.

[10] Chairman Battista notes that the Respondent does not contend that it uniformly prohibited postings by outside organizations. Member Schaumber emphasizes that the Respondent's limitations on postings commenced only after the start of the Union's organizing campaign, and the Respondent offered no business justification for the new restrictions. Member Schaumber does not pass on the lawfulness of posting policies not implemented in response to Sec. 7 activities that may prohibit some types of postings while allowing others.

icy that Diaz had just announced. Mosko acknowledged at the hearing that the perceived dishonesty was simply a misunderstanding. Although no discipline resulted from these events, Mosko never informed the employees that he had decided not to discipline them or that the threat of discipline was being retracted.

In evaluating the Respondent's contention that Garcia's and Hooks' apparent dishonesty provided the Respondent with lawful reason to inform them that they would be disciplined, we apply *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). There, the Supreme Court held that:

> § 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

Id. at 23. The Court found that this rule appropriately guarded the immunity of protected activity; otherwise, "the example of employees who are discharged on false charges would or might have a deterrent effect on other employees." Id.

Here, the *Burnup & Sims* test has been met: Garcia and Hooks were engaged in the protected activity of attempting to assist Jules in dealing with management regarding his work hours; Mosko knew of this activity; the basis of the threatened discipline was Garcia's and Hooks' alleged dishonesty in the course of the protected activity; and they were not, as the Respondent acknowledged, guilty of the alleged dishonesty. Under these circumstances, we find that Mosko's threats of discipline and discharge against Garcia and Hooks would reasonably tend to deter employees from engaging in protected activity, and they therefore violated Section 8(a)(1).

The judge found that the Respondent violated Section 8(a)(1) by Mosko's threats to discharge prounion employee Luis Pacheco for engaging in union activities (specifically, for conduct relating to home visits to solicit coworkers' support for the Union), and by Mosko's harassment of employees by asking them to report other employees' union activities. We agree with the judge that Mosko threatened Pacheco with discharge in violation of the Act.[11] Contrary to the judge, however, we find that Mosko did not unlawfully ask employees to report other employees' union activities.[12]

The allegations at issue arise out of an occurrence in about mid-October 2001, in which Pacheco was summoned to Mosko's office for a meeting with Mosko, Warehouse Superintendent Joe Cox, and employee Henry Ferguson, based on a complaint made by Ferguson. At the meeting, Ferguson became very angry and agitated because employees, including Pacheco, had visited his house on multiple occasions to talk to him about the Union. Ferguson stated that he would turn his dogs on union organizer Steve Marrs and Pacheco if they came by his house again. At that point, Mosko intervened and stated that they were all adults and could settle the dispute in a civilized manner.

As the judge found, Mosko then told Pacheco that misrepresenting the Respondent outside the workplace is grounds for termination. He then told a story about his firing of two employees for conduct away from work. We affirm the judge's finding that this statement by Mosko—made in the context of a meeting regarding complaints about Pacheco's participation in the Union's home visits—constituted an unlawful threat of discharge because of Pacheco's protected conduct.[13]

Contrary to the assertion in Member Schaumber's dissent, Mosko did not simply "relate[] a story about two other employees who had been discharged for misconduct outside the workplace." Rather, in context, the "story" was an implied accusation that Pacheco had engaged in misrepresentation and could be discharged therefor. There is no evidence that Pacheco had misrepresented the Respondent during his home visits and no evidence that Ferguson had come to Mosko to complain about Pacheco's misrepresentation of the Respondent. Rather, it is clear from the record that Ferguson's sole concern was his perceived harassment. Thus, in the context of Mosko's unsupported implication that Pacheco had misrepresented the Respondent in the course of his home visits (i.e., had committed misconduct outside the workplace), Mosko's story was clearly a warning that Pacheco, too, could be discharged—despite the absence of evidence that he had engaged in any misconduct.[14] In accordance with the Board's well-established standard, we find that Pacheco would reasonably interpret Mosko's statement as a threat. See, e.g., *Concepts & Design*, 318 NLRB 948, 954 (1995).

[11] Member Schaumber dissents from this finding.

[12] Member Liebman dissents from this finding.

[13] There is no evidence that the union supporters coerced or threatened Ferguson or any other employee during home calls or otherwise engaged in conduct that would remove their activity from the protection of the Act.

[14] According to Mosko's own testimony, the individuals at issue were employees who had a disagreement in the workplace, and that they "took it across the street [and] they beat each other up." Here, the apparent purpose of the "story" was to inform Pacheco that he could be discharged for misrepresenting the Respondent outside the workplace. That Mosko would liken Pacheco's alleged conduct to such extreme employee behavior underscores that Mosko's real purpose for telling the story was to imply that Pacheco could be fired.

Mosko's other statements during the meeting, however, did not violate the Act. After describing how employees had been discharged for conduct outside the workplace, Mosko read from the Respondent's "Rules of Unacceptable Conduct" the Respondent's prohibition against: "the intimidation, interference, disturbance, or harassment of any associate, including but not limited to, sexual harassment." Mosko told Pacheco that his rule "applied to [employees acting on behalf of] the Union as well." According to Pacheco, Mosko then said, "that if there's [sic] any problems, you know, if anybody harasses, any problems, that we should come to him. You know, on either side we should come to him." After Mosko made this comment, Ferguson asked him how long the Union was allowed to continue campaigning against the Respondent. According to Pacheco, Mosko responded that the Union was allowed to campaign as long as it wanted, and that it even had the right to go to employees' houses and talk with them about the Union.

The judge found that Mosko's request that employees come to him in the event of harassment violated Section 8(a)(1) because it constituted a request by Mosko that employees report the union activities of other employees to him. We disagree with the judge's conclusion and find that Mosko's statement was not a violation of the Act.

As an initial matter, we note that Mosko's statement was about harassment, not about union activity per se. Indeed, Mosko recognized that the Union was entitled to make home visits like those about which Ferguson complained. Thus, Mosko distinguished between permissible union activity, i.e., simple solicitation, and harassment, and made clear in his statements to Ferguson that only the latter was grounds for discipline.

Furthermore, Mosko's reading of the rule and request that employees come to him were made in the face of a harassment complaint by Ferguson, and after observing Ferguson's obviously angry demeanor during the meeting. Thus, it is clear that Mosko more generally sought to defuse the confrontation between employees by reminding those present of the Respondent's preexisting rules regarding their mutual obligations to each other.

The General Counsel has not alleged that this rule, on its face, was unlawful. Mosko simply read the Respondent's rule prohibiting harassment and, by Pacheco's own testimony, stated that if anybody harasses others or there are any problems, either side should come to him. Such a neutral reading of a general work rule, prompted by an employee's complaint and directed to both prounion and antiunion employees, is not coercive.[15] Thus, we dismiss the allegation that Mosko unlawfully requested that employees report other employees' union activities to him.

Member Liebman argues that, in finding that Mosko did not violate the Act by his recitation of the Respondent's rule prohibiting harassment, we ignore the broader context in which those statements were made. We disagree. As noted above, we have considered the overall context in which the statements were made, i.e., an angry confrontation between two coworkers. In addition, most of Mosko's statements discussed by Member Liebman were neither alleged nor found to be unlawful.[16] Mosko was faced with an employee dispute, and his reading of neutral work rules was an attempt to resolve this dispute. After considering Mosko's allegedly unlawful comments in the context of his recognition of the Union's right to campaign and to conduct home visits, we find that Pacheco could not reasonably have understood Mosko's comments about harassment to have constituted an unlawful request that employees report to him the union activities of others.

Our dissenting colleague says that the complaining employee (Ferguson) suggested that the Respondent fire union supporters. Although Mosko did not expressly disavow this suggestion, he did expressly reaffirm employee rights to support the Union. Further, the fact that Mosko expressed antiunion views does not change the result, for these views are protected by Section 8(c).

B. The 8(a)(3) Allegations

The judge found that the Respondent violated Section 8(a)(3) of the Act by repeatedly disciplining and eventually discharging prounion employee Luis Pacheco. We agree with the judge, although our decision is based on narrower grounds.

Between May 3, 2001, and March 15, 2002, Pacheco was disciplined on four occasions under the Respondent's progressive disciplinary system. Under this system, employees were subject to the following successive

[15] Member Liebman, noting that Ferguson threatened to turn his dogs on union organizer Marrs, argues in her dissent that the Respondent did not warn Ferguson for his conduct. However, it is undisputed that, immediately after Ferguson made this statement, Mosko interrupted Ferguson and said to him that they should settle the dispute in "a civilized manner." Thus, the record demonstrates, despite our dissenting colleague's contention, that Mosko did not ignore Ferguson's threatening statement insofar as it was directed at Pacheco.

[16] As discussed above, however, Chairman Battista agrees with the judge that Mosko's comments regarding misrepresentation as grounds for termination were coercive. He takes this finding into consideration when examining the broader context in which Mosko's comments were made.

levels of discipline: oral warning; written warning; final warning; and suspension and/or discharge.

On May 3, 2001, Pacheco was given an oral warning for having five "Lates."[17] It is undisputed that Pacheco was late on all the days identified as occurrences leading to the warning, with the final occurrence coming on April 20, 2001.[18] On May 24, 2001, after one more Late, Pacheco was issued a written warning for lack of punctuality. Again, there is no dispute that Pacheco was late on the day in question.

Pacheco was disciplined for two further incidents. He was issued a final warning on February 14, 2002, for a misshipment, which consists of sending merchandise—in this case, a pallet of apple juice—to the wrong store. Finally, he was suspended on March 14, 2002, and discharged the following day, after two or three pallets of merchandise were found on the loading dock shortly after Pacheco's March 13 shift ended, with no explanation or instructions for the next shift. With regard to both of these latter incidents, there are factual disputes that the judge did not find necessary to resolve.

C. Wright Line Analysis

We analyze allegations of discipline and discharge because of union activities under the burden-shifting framework of *Wright Line*.[19] The Respondent contends that it did not have antiunion animus and that the adverse actions it took against Pacheco were unrelated to his union activities.[20]

1. Animus

Like the judge, we find that the Respondent's many 8(a)(1) violations, discussed above and described more fully in the judge's decision, amply demonstrate the Respondent's animus. These violations include threats directed at Pacheco himself,[21] as well as Supervisor Luis Funes' accurate and timely predictions of imminent terminations of union supporters, including Pacheco.[22] We thus reject the Respondent's contention and find that it did express animus toward employees who acted in support of the Union, including Pacheco.

2. The Respondent's defense

The Respondent asserts that each of Pacheco's disciplines was legitimately based on his violations of work rules regarding punctuality (May 3 and 24, 2001 oral and written warnings) and his job performance failures (February 14, 2002 misshipment and March 13, 2002 unfinished work). Moreover, the Respondent contends that each discipline was properly given in accordance with its progressive discipline policy. For the reasons stated below, the judge correctly concluded that the evidence fails to support the Respondent's contentions.

D. Applicable Standard and Overview

To rebut the General Counsel's initial showing, the Respondent must demonstrate that it would have disciplined Pacheco as it did, even in the absence of his protected activities. The Board has found that "in the ab-

[17] Under the Respondent's attendance and punctuality policy, each "Late" is either a day on which an employee punched in 8 or more minutes after the start of the shift or a combination of three "K-Lates," which are days on which the employee punched in 3–7 minutes late. Employees are subject to discipline under the policy if they have five or more Lates during a 6-month performance evaluation period (January–June and July–December of each year). Each subsequent Late within the 6-month period moves the employee to the next step of progressive discipline. Thus, if the first five Lates result in an oral warning (i.e., if the employee is not already past the first step of progressive discipline), the sixth Late should result in a written warning, the seventh Late in a final warning, and the eighth Late in suspension and/or termination of employment.

[18] The judge found it significant that Pacheco's oral warning occurred 2 weeks after his fifth Late, but only 1 day after Pacheco attempted to serve as coworker representative for another employee at a meeting with Mosko. Mosko and Supervisor Keith Thomas both testified that Thomas had not been told of this incident when he issued the oral warning to Pacheco the following day. As discussed below, we find sufficient evidence of inconsistency and disparate treatment of Pacheco to support the violation. Thus, we need not rely on the timing of the warning in relation to Pacheco's May 2 protected activity.

[19] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To meet his initial burden of showing the Respondent's unlawful motivation, the General Counsel must demonstrate that the Respondent had antiunion animus; that Pacheco engaged in union activities; that the Respondent knew of these activities; and that the Respondent took adverse action against Pacheco. If the General Counsel makes this initial showing, the burden of persuasion then shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the union activities. E.g., *Robert Orr/Sysco Food Services*, 343 NLRB 1183 fn. 6 (2004).

[20] The Respondent does not dispute that Pacheco was one of its most vocal prounion employees and that it was aware of Pacheco's support for the Union. Nor does the Respondent dispute that it took adverse action against Pacheco by disciplining and discharging him.

[21] As discussed above, Member Schaumber does not join with his colleagues in finding that Mosko unlawfully threatened Pacheco.

[22] Several times, beginning shortly after the January 2002 representation election, Funes made statements to prounion employee Miguel Marin indicating that prounion employees were about to be terminated; soon after each statement, prounion employees were discharged. In March 2002, Funes told Marin that "they were going to fire a big guy from the Union." Marin named several prounion employees he thought Funes might be referring to (including himself); when Marin named Pacheco, Funes responded that it was "not his turn yet." A few days after this conversation, Hooks was discharged. (Hooks was reinstated in October 2002 after he filed an unfair labor practice charge regarding the discharge; however, he was discharged again in December 2002 and again filed an unfair labor practice charge, which was pending at the time of the hearing in this case.) Pacheco's termination occurred soon after Hooks', on March 15, 2002. The judge found, and we have affirmed above, that Funes' statements to Marin were threats of discharge for Pacheco's and other employees' union activity.

sence of countervailing evidence, such as that of disparate treatment based on protected activity, the Respondent [can meet its *Wright Line* burden] by demonstrating that it has a rule . . . and that the rule has been applied to employees in the past." *Avondale Industries*, 329 NLRB 1064, 1066 (1999) (quoting *Merillat Industries*, 307 NLRB 1301, 1303 (1992)). However, an employer fails to meet its burden where the evidence affirmatively shows a lack of consistency in the employer's application of its disciplinary rules, and where the case for unlawful motive is substantial. See, e.g., *Septix Waste, Inc.*, 346 NLRB No. 50, slip op. at 3 (2006).

In defending an allegation of discriminatory disparate treatment, the Respondent does not meet its burden "simply by showing that examples of consistent past treatment outnumber the General Counsel's examples of disparate treatment." *Avondale Industries*, 329 NLRB at 1066. Rather, "the Respondent must prove that the instances of disparate treatment shown by the General Counsel were so few as to be an anomalous or insignificant departure from a general consistent past practice." Ibid.

The Respondent has not met its burden here. The *Septix Waste* factors are present here. First, as detailed below, the evidence demonstrates something substantially less than a consistent disciplinary practice sufficient to overcome the General Counsel's showing of discrimination. Rather, it reinforces the finding of unlawful conduct, because it shows atypically strict treatment of Pacheco with regard to his punctuality, which formed the basis for Pacheco's oral and written warnings. Second, the evidence of the Respondent's unlawful motive is strong, particularly in view of the Respondent's threats (by Funes and Mosko) to discharge Pacheco because of his union activity.[23] Third, the instances of disparate treatment here were not "an anomalous or insignificant departure from a general consistent past practice." Indeed, the evidence demonstrates the Respondent's widespread inconsistency in enforcing its punctuality policy.[24] Under these circumstances, we find that the May 3 oral warning and the May 24 written warning, although given in accordance with the Respondent's written punctuality policy, reflected an atypically, and discriminatorily, strict application of that policy.

E. The Respondent's Evidence of "Consistent" Practice

In arguing that it demonstrated that it would have disciplined Pacheco for his tardiness even in the absence of his union activity, the Respondent relies heavily on evidence that a number of other employees, some of them antiunion, were also disciplined for tardiness. However, the Respondent's evidence is significantly less compelling than it contends. First, the Respondent offered into evidence only the disciplinary reports, not the underlying attendance reports and timecards; thus, we are unable to assess whether the disciplinary reports accurately document all of the Lates recorded on these employees' attendance reports, and whether the attendance reports recorded the employees as Late or K-Late (or as an excused tardy) each time that they actually arrived tardy.[25]

Second, even accepting at face value the Respondent's disciplinary reports, roughly half of the disciplined employees were not disciplined upon obtaining five Lates, as was Pacheco. Four of the employees (Sam Tolbert, Oaski Morales, Eddie Datuin, and Michael Steward) were disciplined only after each had six Lates; and four more employees (Felix Albelo, Steve Streitz, David Gastelu, and Barbara Howard) were disciplined only after each had seven Lates.[26] In addition, after receiving an oral warning, Thomas Harrison had two Lates and five K-Lates before he was issued a written warning;[27]

[23] In accordance with his position that Mosko did not unlawfully threaten to discharge Pacheco, Member Schaumber would not rely on that finding here. Nevertheless, he agrees with his colleagues that the Respondent's other conduct, particularly Funes' threats (discussed above at fn. 22), evince the Respondent's unlawful animus.

[24] As stated above, the Respondent bears the burden of demonstrating that it would have disciplined Pacheco as it did, even in the absence of his union activity. Consequently, ambiguity in the record evidence, especially if it is due to the lack of explanatory documents or testimony, weighs against the Respondent and negates its defense.

[25] In contrast, the General Counsel submitted a number of employees' weekly timecards, annual attendance reports, disciplinary reports, and semiannual performance evaluations. These documents, in conjunction with credited testimony, demonstrate that the Respondent did not consistently apply its punctuality policy, thus undermining the persuasiveness of the Respondent's proffered evidence.

For example, as described below, the record demonstrates pervasive inconsistencies between the timecards of antiunion employee Daniel McDuffie and his attendance reports. While the time cards appear to demonstrate chronic tardiness, McDuffie's attendance reports for the same time periods show far fewer recorded Lates. The Respondent's habitual failure to record McDuffie's Lates raises unanswered questions about the general accuracy and completeness of the documentation on which the Respondent's proffered disciplinary reports are based, and thus about the accuracy and completeness of the disciplinary reports themselves.

[26] Morales and Gastelu, when finally disciplined, were given written warnings. Gastelu's written warning, dated January 10, 2002, states that he had been counseled for the "same or similar reason" on June 25, 2001, but no such discipline report was offered into evidence. Other "missing" reports are specified in fn. 28, below.

[27] If Harrison had been disciplined in strict compliance with the Respondent's policies, as was Pacheco, he would have received a written warning when he was Late once more after his oral warning (i.e., when he had six Lates in a 6-month period). Similarly, a final warning should have followed upon his seventh Late during the 6-month period. Such strict compliance with the policies would have resulted in suspen-

and he had an additional four Lates and five K-Lates before he was issued what appears to be a final warning.[28] Seven of the nine employees named above (i.e., all but Morales and Steward) were identified by Mosko as individuals who he knew did not support the Union. Thus, the Respondent's own rebuttal evidence demonstrates not only the inconsistent application of its punctuality policy but also that application's tendency to favor antiunion employees.

F. Detail of the General Counsel's Evidence of Inconsistent Practice and Disparate Treatment

The General Counsel offered detailed evidence regarding the Respondent's inconsistent application of its punctuality policy. The record is most complete with regard to antiunion employee Daniel McDuffie's persistent tardiness and the Respondent's failure to discipline him for it.[29] Pacheco identified McDuffie as one of the openly antiunion employees whom he saw routinely arriving at work late without disciplinary consequences. A comparison of McDuffie's 2001 attendance report against his timecards for the same period is illuminating. His 2001 attendance report reflects only four Lates and one K-Late, all within the last 2-1/2 months of the year. On its face, this would not call for discipline. Significantly, however, the punch-in times on McDuffie's timecards reflect that, during the second half of 2001, he was Late *41 times* and K-Late an additional *12 times*.[30] Although the Respondent's utter failure to document McDuffie's tardiness may leave some uncertainty about whether some apparent Lates or K-Lates should be counted, there is no escaping the overall picture: in most of 2001, McDuffie was consistently and perpetually late to work, and the Respondent was not concerned enough even to document it, let alone to discipline him for it.

The Respondent's inconsistent application of the punctuality policy with respect to McDuffie continued into 2002. As of June 5, 2002, McDuffie's 2002 attendance report reflected 2 unexcused Lates and 10 K-Lates, totaling 5 Lates and justifying the issuance of discipline. However, McDuffie's timecards for the evaluation period reflect that, as of that date, he actually had 9 unexcused Lates and 13 K-Lates, totaling 13 Lates.[31]

The evidence of the Respondent's uneven enforcement of its punctuality policy with regard to other comparators identified by Pacheco, although less overwhelming in the absence of a full set of timecards for each individual, fully supports the judge's finding of disparate treatment. Indeed, the Respondent admits that antiunion employees Yvonne Gaddis and Cheryl Quant should have received discipline for punctuality, based on their attendance reports, but did not.[32]

According to Gaddis' 2001 attendance report, between January and June 2001, she accumulated 21 K-Lates and 1 Late. However, six of her K-Lates, dated February 8–21, 2001, appear to have been excused. Even accepting that these K-Lates were excused, Gaddis had accumulated at least 15 other K-Lates, equivalent to 5 Lates, by May 31, 2001. Tice admitted that Gaddis should have been issued an oral warning. However, she was disciplined only after she had another Late on June 5, 2001. When questioned about these inconsistencies, Mosko had no explanation beyond "her manager dropped the ball." In 2000, Gaddis had at least five Lates in January and February but was not issued a verbal warning until May

sion and possible termination for Harrison, rather than a written warning.

[28] Harrison's oral warning, apparently dated April 17, 2001, is not included in the record; thus, we do not know how many Lates he was charged with accumulating before he was issued an oral warning. Similarly absent from the record are Howard's written warning dated October 16, 2002 (referenced in what appears to be a *second* written warning—not the final warning that the Respondent's policy called for—issued to Howard on December 3, 2002), and Javon June's oral warning dated July 17, 2002 (referenced in his written warning dated August 11, 2002).

[29] In addition to McDuffie's 2000–2002 annual attendance reports, semiannual performance evaluations, and his disciplinary documents, the record also contains copies of McDuffie's weekly timecards, showing his actual punch-in times, for the entire period from May 26, 2001, through August 2, 2002, as well as several weeks in late August and September 2002. In assessing whether McDuffie's punch-in times represent on-time or tardy arrivals, we take note of, but do not strictly apply, the Respondent's policy (testified to by Mosko and documented in the Respondent's job description for selectors and loaders) that employees may not punch in early for shifts without a supervisor's permission.

[30] Moreover, the timecards appear to indicate that McDuffie was Late five times and K-Late an additional two times between the last week of May and the end of June 2001. None of these tardies is marked on his 2001 attendance report.

[31] The Respondent argues that McDuffie's attendance record does not support a finding of disparate treatment because his starting time had been changed without the knowledge of the supervisor who recorded Lates on the attendance sheet. However, McDuffie's timecards show such frequent tardiness that, if the punctuality policy had been applied uniformly, he would have been terminated well before the alleged shift change.

[32] Gaddis' and Quant's weekly timecards are not included in the record. Thus, in assessing the discipline due to them, we rely only on the Lates and K-Lates documented on their attendance reports. Nonetheless, in view of the Respondent's failure to consistently document tardy punch-ins on employees' attendance reports, as described above with regard to McDuffie, we do not know the true extent of Gaddis' and Quant's actual tardiness.

The same is true of Henry Ferguson, whom Pacheco identified as another frequently tardy employee. According to Ferguson's 2001 and 2002 attendance reports, he had at least four Lates in each evaluation period of 2002 (just within the disciplinary standard) and at least three Lates in each evaluation period in 2001. Ferguson's timecards, which could confirm or refute Pacheco's testimony about Ferguson's actual tardiness, are not a part of the record.

11, after she had a sixth Late on May 10—and that warning only reported the first five Lates. Gaddis had yet another Late on June 6, which should have resulted in a final warning. However, Gaddis was not disciplined for her sixth or seventh Late.

Cheryl Quant's 2001 attendance report reflects 2 Lates and 12 K-Lates (totaling 6 Lates) for the first half of the year, but she was not disciplined for tardiness. Tice admitted that Quant exceeded the tardiness guidelines in the first half of 2001 and should have been disciplined; he could not explain why she was not disciplined.[33]

G. Conclusion Regarding Tardiness Disciplines

We find that the evidence detailed above amply demonstrates the Respondent's general inattention to documentation of, and inconsistent discipline for, tardiness by employees other than Pacheco. Based on the Respondent's inconsistent practice and its disparate treatment of Pacheco, we find that the Respondent did not rebut the General Counsel's showing that Pacheco's tardiness disciplines were motivated by antiunion animus. Thus, we agree with the judge that these disciplinary warnings were unlawful.

H. Subsequent Disciplines and Discharge

Under the Respondent's progressive discipline policy, Pacheco's final warning and suspension/discharge grew out of the unlawful oral and written warnings for punctuality violations, and thus, the later (and increasingly severe) disciplines were also unlawful.

According to the Respondent's policy, each type of discipline has an "effective period," during which further disciplinary actions progress to the next level. The effective period is 6 months for an oral warning and 12 months for a written or final warning. Thus, after Pacheco's May 3, 2001 oral warning for tardiness, his second occurrence of the same infraction within 6 months led to a written warning.[34] Because that written warning was still in effect when Pacheco's misshipment occurred approximately 9 months later, the misshipment resulted in a final warning, rather than another oral or written warning.[35] Similarly, the final warning was still in effect 1-month later, when the pallets of merchandise were found on the loading dock, resulting in a suspension that was converted to a discharge.

Because we find that Pacheco's oral and written warnings in May 2001 were unlawful, the final warning and suspension/discharge were also unlawful.[36] Thus, the entire series of disciplinary actions against Pacheco, beginning with his May 3, 2001 oral warning and ending with his March 15, 2002 discharge, must be rescinded. See *Hays Corp.*, 334 NLRB 48, 50 (2001) ("It is well settled that, where a respondent disciplines an employee based on prior discipline that was unlawful, any further and progressive discipline based in whole or in part thereon must itself be unlawful.").

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Publix Super Markets, Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disparately applying its no-solicitation/no-distribution rule by preventing the posting of union materials, while allowing the posting of other materials.

(b) Threatening its employees that the plant will close if employees select the United Food & Commercial Workers Union, Local 1625 (the Union) to represent employees as their collective-bargaining representative.

(c) Threatening employees that the Respondent will deny employees employment opportunities if employees select the Union as their collective-bargaining representative.

(d) Threatening employees that the Respondent will discharge employees and take unspecified reprisals against them if employees try to assist fellow employees to address work-related issues with the Respondent, if employees file a lawsuit about terms or conditions of employment, and/or if employees engage in other concerted protected or union activities.

(e) Discouraging employees from distributing prounion handbills by prohibiting employees distributing

[33] Member Liebman would also rely on the Respondent's failure, throughout 2001 and the first quarter of 2002, to document the Lates of Pest-Control Lead Person Paul Kennedy. Like the judge, Member Liebman is not persuaded by Mosko's unsupported and uncorroborated testimony that Kennedy had no fixed schedule, in contrast to all other employees (including the other pest-control employees). Even if Kennedy's scheduled starting time did vary, consistent enforcement of the Respondent's punctuality policy would require that someone with knowledge of Kennedy's schedule track his compliance with the schedule, and there is no evidence that anyone did so.

[34] Had Pacheco's second infraction been different in kind than his first infraction, the progressive discipline policy would have called for a second oral warning, rather than a written warning.

[35] If Pacheco had received an oral warning for tardiness only after he had reached six Lates, or if he had received a written warning only after seven or more Lates, as several other employees, described above, did, he would have restarted the progressive discipline system when the misshipment occurred, and he would have received, at most, another oral warning. Thus, the Respondent's disproportionately stringent punctuality enforcement as to Pacheco had unmistakably severe consequences.

[36] We need not address the substance of the final warning and suspension/discharge in early 2002, particularly in light of the unresolved state of the facts regarding those events.

prounion handbills, but not those distributing antiunion handbills, from parking in the Respondent's parking lot.

(f) Threatening employees that they will not be able to address grievances with supervisors if employees select the Union as their bargaining representative.

(g) Threatening employees that they will lose wages, jobs, and/or benefits if employees select the Union as their bargaining representative.

(h) Implying that employees' union activities would be under surveillance.

(i) Issuing oral or written disciplinary warnings because employees support or assist the Union or engage in concerted activities, or to discourage employees from engaging in these activities.

(j) Suspending or discharging employees because employees support or assist the Union or engage in concerted activities, or in order to discourage employees from engaging in these activities.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Luis Pacheco full reinstatement to his former job or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Luis Pacheco whole, with interest, for any loss of wages and benefits that he may have suffered as a result of his suspension and termination.

(c) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful May 3, 2001 oral warning, May 25, 2001 written warning, February 14, 2002 final warning, March 14, 2002 suspension, and March 15, 2002 discharge of Luis Pacheco, and within 3 days thereafter notify him in writing that such action has been taken and that the warnings, suspension, and discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Miami, Florida, copies of the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER LIEBMAN, dissenting in part.

As the Board has explained:

> [E]mployers violate Section 8(a)(1) of the Act when they invite their employees to report instances of fellow employees' bothering, pressuring, abusing, or harassing them with union solicitations and imply that such conduct will be punished. . . . [S]uch announcements from the employer are calculated to chill even legitimate union solicitations, which do not lose their protection simply because a solicited employee rejects them and feels "bothered" or "harassed" or "abused" when fellow workers seek to persuade him or her about the benefits of unionization.

Greenfield Die & Mfg. Corp., 327 NLRB 237, 238 (1998). Contrary to the majority, I would find that Distribution Manager Jack Mosko violated Section 8(a)(1) when he read out loud the Respondent's rule prohibiting harassment and invited employees to come to him if harassment occurred.[1]

[37] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] I join in the majority's decision except with regard to Mosko's statements about harassment. I also join the majority in finding no violation in the Respondent's denial of Joaquin Garcia's request for a representative at an investigatory interview. I dissented in *IBM Corp.*, 341 NLRB 1288 (2004), which is the basis for dismissing this allegation. Nevertheless, I recognize that the majority decision in *IBM Corp.* represents current Board law. As a result, and for institutional reasons, I join the majority. I observe that Garcia was not disciplined subsequent to the denial of his request.

The majority focuses narrowly on the facially neutral aspects of Mosko's statements, missing their broader context, which was rife with coercion.

Mosko's statements were made at a meeting called expressly to respond to employee Henry Ferguson's complaints that the Union's home calling constituted harassment.[2] During the same meeting, Mosko unlawfully threatened to discharge employee Luis Pacheco for engaging in the conduct that he was asking employees to report. Moreover, Mosko made several statements about the Union and its supporters which, in context, were coercive, including the statement that the Union was trying to chop Publix off at the knees and that anyone who supported the Union's efforts to harm the Respondent should be ashamed of himself.[3]

The majority errs in relying on the supposed evenhandedness of Mosko's recitation of the rules regarding conduct outside the workplace and on the fact that Mosko's request was made in response to Ferguson's complaint.[4] As the majority itself properly acknowledges, there was no evidence of any actual harassment during the home calling by union supporters. Although Pacheco did testify that Mosko referred to "either side" coming to him if anybody was harassed, Pacheco also testified that Mosko specifically told him "that it applies to the Union." Furthermore, although Ferguson had threatened, in Mosko's presence, to turn his dogs on union organizer Steve Marrs and Pacheco if they came to his house again, Mosko did not address his warnings directly to Ferguson, as he had to Pacheco.[5] Finally, Mosko's remarks were interspersed with his disparaging comments against the Union and its supporters.

Under the circumstances, then, it would appear that Mosko's recitation of the rule was aimed at Pacheco and the union supporters engaged in home calling. Thus, it was unlawful. See, e.g., *Bloomington-Normal Seating Co.*, 339 NLRB 191 fn. 2 (2003), enfd. 357 F.3d 692 (7th Cir. 2004).

MEMBER SCHAUMBER, dissenting in part.

I agree with my colleagues in all respects except one: I would reverse the judge's finding that Jack Mosko made a veiled threat of discharge to Luis Pacheco when, during an October 2001 meeting with Pacheco and Henry Ferguson, Mosko read from the Respondent's rule against misrepresentation and related a story about two other employees who had been discharged for mis-conduct outside the workplace.[1]

The meeting at issue was called to address a complaint about purported nonworkplace misconduct by Pacheco during the course of his home visits to employees, specifically Ferguson. Both the harassment and misrepresentation rules applied to conduct outside the workplace, including conduct that might occur during the course of home visits, and neither rule is alleged to be facially unlawful. Mosko simply read the rules to both employees and stated that the rules applied equally to employees who supported or opposed the Union. His reference to other employees who had been disciplined for nonworkplace misconduct was not a veiled threat, but rather reinforced that a number of the Respondent's rules applied to conduct outside the workplace, and that violations of those rules could result in discipline. Mosko did not accuse Pacheco of a violation of the misrepresentation rule, nor did he state that Pacheco's organizational activities

[2] Although the majority states that union supporters had visited Ferguson's home on "multiple" occasions, they visited only twice. Only on their second visit did Ferguson tell them that they were not welcome, after which they did not return.

[3] The majority would not rely on these statements, even as context, because they were not alleged or found to be independently unlawful. In my view, these statements, whether independently unlawful or not, are relevant evidence of coercion under the Board's totality-of-the-circumstances standard. *Grinnell Fire Protection Systems*, 328 NLRB 585, 587 (1999).

[4] The majority further errs in contending that, by acknowledging employees' right to solicit support for the Union, Mosko alleviated the coerciveness of the meeting and "distinguished between permissible Union activity, i.e., simple solicitation, and harassment, and made clear in his statements to Ferguson that only the latter was grounds for discipline." Mosko referred to the solicitors' rights only in response to Ferguson's irate demand to know how long the Union was allowed to "campaign against Publix" and Ferguson's assertion that "if this was happening [at another company], they would have been fired a long time ago." (Mosko did not respond to Ferguson's implicit suggestion that the Respondent fire the prounion employees.) In any event, a factual acknowledgement of the Union's well-established right to campaign hardly negates the coerciveness of this meeting: when asked what else Mosko talked about at the meeting, Pacheco testified that "the whole thing" was "against the Union," including Mosko's assertions that the Union was trying to chop Publix off at the knees; that the Union was causing lawsuits to be filed against the Company; that the Union was trying to hurt the Company; and that "anybody that would support something like that should be ashamed of themselves."

[5] The majority contends that Mosko's failure to warn Ferguson for his threat does not undermine Mosko's evenhandedness, because Mosko did not ignore the threat but instead suggested that Ferguson and Pacheco settle the disagreement "in a civilized manner." But plainly, Mosko did not act evenhandedly in treating Ferguson's direct threat of physical violence comparably to Pacheco's nonharassing solicitation. Even assuming that Mosko's response to Ferguson's initial threat was adequate, the fact remains that, after Mosko read the no-harassment rule, Pacheco expressly complained that Ferguson was threatening and intimidating him, and Mosko "just ignored" Pacheco's complaint. Mosko's failure to respond to Pacheco's complaint—especially where Mosko personally witnessed Ferguson's threat of violence—belies any claim that Mosko acted evenhandedly.

[1] This is consistent with our decision to reverse the judge's finding that Mosko violated the Act when, during an October 2001 meeting with employees Pacheco and Ferguson, he read from the Respondent's antiharassment policy and told the employees that either side should come to him in the event of harassment.

ran afoul of it. He simply read two rules and cited instances in which employees had been disciplined for nonworkplace misconduct. In light of these circumstances, I don't find Mosko's statements to constitute veiled threats and would dismiss this allegation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT disparately apply our no-solicitation/no-distribution rule by preventing the posting of union materials, while allowing the posting of other materials.

WE WILL NOT threaten you by telling you that the plant will close if you select the United Food & Commercial Workers Union, Local 1625 (the Union) to represent you as your collective-bargaining representative.

WE WILL NOT threaten you by telling you that we will deny you employment opportunities if you select the Union as your collective-bargaining representative.

WE WILL NOT threaten you that we will discharge you and take unspecified reprisals against you if you try to assist fellow employees to address work-related issues with us, if you file a lawsuit about terms or conditions of employment, and/or if you engage in other concerted protected or union activities.

WE WILL NOT discourage you from distributing prounion handbills by prohibiting employees distributing prounion handbills, but not those distributing antiunion handbills, from parking in Respondent's parking lot.

WE WILL NOT threaten you by telling you that you will not be able to address grievances with supervisors if you select the Union as your bargaining representative.

WE WILL NOT threaten you by telling you that you will lose your wages, your jobs, and/or your benefits if you select the Union as your bargaining representative.

WE WILL NOT make it appear to you that we are watching to see if you engage in union activities.

WE WILL NOT issue you oral or written disciplinary warnings because you support or assist the Union or engage in concerted activities, or in order to discourage you from engaging in these activities.

WE WILL NOT suspend or discharge you because you support or assist the Union or engage in concerted activities, or to discourage you from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Luis Pacheco full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Luis Pacheco whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplines and discharge of Luis Pacheco, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the disciplines and discharge will not be used against him in any way.

PUBLIX SUPER MARKETS, INC.

Karen Thornton, Esq., for the General Counsel.
David C. Hagaman, Esq., Kevin M. Smith, Eas., and *Brett P. Ruzzo, Esq.,* for the Respondent.
Steven Marrs, International Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge: This consolidated case was heard before me on nine separate days between March 10 and 27, 2003, in Miami, Florida. The complaint as amended at the hearing was issued by the Regional Director for Region 12 of the National Labor Relations Board (the Board) based on charges brought by United Food & Commercial Workers, International Union, AFL–CIO/CLC (the Charging Party or the Union) and Tarvis Hooks, an individual, and Joaquin Garcia, an individual, and Edgar Linarte, an individual and alleges that Publix Super Markets, Inc. (the Respondent or the Company) has engaged in and is engaging in violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent has by its answer, as amended at the hearing, denied the commission of any violations of the Act.

On the entire record, including testimony of the witnesses and the exhibits received in evidence and after review of the

briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits and I find that at all times material during the 12-month period preceding the filing of the complaint, Respondent has been a Florida corporation, with an office and place of business located in Miami, Florida, where it has been engaged in the operation of a warehouse and distribution center for the distribution of groceries to its retail stores, Respondent in conducting its business operations derived gross revenues in excess of $500,000 and purchased and received at its facility, goods and materials valued in excess of $50,000 directly from points located outside the State of Florida and at all material times Respondent has been an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that at all times material the International Union has been a labor organization within the meaning of Section 2(2), (6), and (7) of the Act.

III. STATEMENT OF FACTS

A. Introduction and Background

The following is largely undisputed and is set out in the General Counsel's brief and is supported by the record in this case:

These cases[1] involve Respondent's alleged violations of Section 8(a)(1) and (3) of the Act. They occurred as part of Respondent's response to the organizing efforts of employees on behalf of the United Food & Commercial Workers Union, Local 1623, AFL–CIO, CLC (the Union). The 8(a)(1) conduct extends from 1999 to 2002 and was alleged to have been committed by numerous supervisors and department heads and to have taken place both in large meetings and in one-on-one conversations with employees. The 8(a)(1) allegations run the gamut from threats of plant closure, loss of jobs and benefits to denying employees a witness in a meeting that could have lead to discipline under *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000). The 8(a)(3) allegations involve various forms of discipline, including the suspension and discharge, of well-known and longtime union adherent Luis Pacheco by Respondent.

Respondent[2] operates a full service dry grocery warehouse and distribution center in Miami, Florida, for Publix Supermarkets. It is part of Publix Super Markets that operates a grocery chain in Florida and other states that the Union has been attempting to organize for many years.

The Miami warehouse is a 69-door facility and employs about 400 employees, referred to as associates, overall in the warehouse. There are two shifts in the warehouse department. Respondent's operations include a grocery department, a cafeteria, in-house maintenance, a garage, facility services, dispatch, and a recycle department.

Jack Mosko is the distribution manager at the Miami facility and is responsible for the whole warehouse operation. Richard Schuler held the position of distribution manager from 1995 to mid-2000. Schuler is now vice president of distribution and his office is in Respondent's corporate office located in Lakeland, Florida. Joe Cox, the warehouse superintendent of grocery, reports directly to Mosko. Cox is in charge of the grocery department, the day and night shift, receiving, shipping, inventory, the cafeteria, and sanitation.

Desmond Tice is the day-shift department head and he is in charge of receiving, shipping, sanitation, and pest control. Joue Cardona is the night-shift department head and Keith Hankerson is the assistant department head on the night shift. Tice and Cardona report directly to Cox.

The line supervisors reporting to Tice on the day shift for shipping and receiving are Alvin Pratt, Keith Thomas, and Wendell Braye. Pratt supervises the day-shift forklift operators and warehousemen. Thomas supervises the day-shift selectors and order checkers. Braye supervises the sanitation and pest control and fills in for Thomas and Pratt when they are out.

The line supervisors on the night shift are Kathy McColgin, John Pinho, Mike Collins, Caven Morgan, Joe Dineen, and James Royer, and although no longer employed, at one time, Luis Funes. The six first-line supervisors report to Keith Hankerson, assistant department head and everybody on that shift reports to Cardona. In addition, Cardona has the direct responsibility for clerks and jockeys. Similarly, Hankerson has direct responsibility for inventory. The line supervisors each have responsibilities for teams consisting of forklift operators, sanitation, and selectors.

Sanitation has 28 employees. Sanitation workers are responsible for making sure that it is a safe environment for the selectors and motor operators. Sanitation associates pick up damaged merchandise, sweep out the aisles, and make sure that there is no debris on the floor.

Repack is an extension of sanitation. Sanitation generally repacks the cases of damaged merchandise that is found in the warehouse and ships it out to the store or takes it back to Respondent's reclamation center. Repack is located in the southwest corner of the warehouse. There are two designated em-

[1] The United Food and Commercial Workers International Union, AFL–CIO, CLC and UFCW Local 1625, and individuals Tarvis Hooks, Joaquin Garcia, and Edgar Linarte filed the charges in these cases, the first being filed October 18, 1999, by the International and the last amended charge being filed on September 18, 2002, also by the International. Following the issuance of the consolidated complaint on October 31, 2002, Respondent filed a timely answer denying the essential allegations in the consolidated complaint. Another Order consolidating cases for hearing and notice of hearing to add the objections in Case 12–RC–8716 was issued on December 12, 1992. The Region issued an Order Severing Cases, Approving Withdrawal of Petitioner's Obections to Election and Certification of Results of Election on March 7, 2002. The trial in this matter was held on March 10–14, 24–27, 2003, in Miami, Florida. At trial, the complaint was amended on the record to correct titles of supervisors and dates of certain 8(a)(1) allegations in complaint. Respondent amended its answer accordingly.

[2] Respondent amended its answer at trial to change the name of Respondent to Publix Supermarket, Inc. Miami Distribution Center, Inc.

ployees who are generally assigned to work on repack, but other sanitation employees also work it.

Mike Fitzpatrick is currently the dispatcher superintendent. In June–August 1999, he was the night-shift department head in charge of the shipping operation on the night shift. Joe Dineen, a front line supervisor on the night shift, was a dispatcher on the night shift between September 2001 and 2002.

Respondent offers a 401(k), a retirement plan, a profit-sharing plan, a cafeteria where employees are provided a free lunch, and provides employees with a Christmas or holiday bonus, which can be as much as 2 weeks of full wages.

Respondent has an ongoing educational program training for managers and supervisors referred to as "union-avoidance" training. The training does not end following a union campaign.

Since 1993, the Union was involved in discrimination lawsuits that resulted in large settlements involving Respondent. The lawsuits received publicity and the Union used the publicity in its ongoing campaign to organize Respondent's employees. The Union has been attempting to organize Respondent's production and maintenance employees at the warehouse since late 1995, with an ongoing campaign of varying levels of intensity. The Union's International representative, Steven Marrs, testified that former employee Mario Eaton began an in-house group called the Publix Union Brigade to address problems concerning workplace rules, wages, work schedules, and some of the managers. Marrs himself is a former company employee who resigned in and was later recruited by the Union to work as an organizer and subsequently worked on the Union's efforts to organize the Company. The Publix Union Brigade drew up a petition demanding changes in the workplace rules and faxed it to Respondent.

In 1995, Eaton contacted Union Representative Marrs and they met in 1996. In 1996, they began to build a small committee. Mario Eaton, Domingo McCoy, and Luis Pacheco were the main employees involved. In 1996, the interest in organizing came from mostly Hispanic associates because Hispanic employees perceived that African-Americans were getting better jobs and more promotions than Hispanics because of a prior race discrimination lawsuit. The committee handbilled the Miami warehouse a few times, about every 2 weeks, did some home calling, and were getting authorization cards signed. Marrs and International Representative Bob Andrews worked on the campaign.

Marrs testified that after a few weeks, Eaton had a change in attitude and became hard to contact. In May 1998, Respondent discharged Eaton. The Union filed an unfair labor practice charge on his behalf. The Region issued a complaint and the hearing opened on September 8, 1998. Prior to the close of the trial, the parties reached a settlement. The settlement renewed interest from Miami employees in trying to organize. Luis Pacheco and Domingo McCoy contacted Marrs asking him to meet with them and talk to them about starting another organizing campaign at Publix Supermarkets, Miami Distribution Center. Marrs began to build a campaign. The group of employees interested in organizing expanded from McCoy and Pacheco to include Tarvis Hooks, Miguel Marin, Felix Berrios, Nay Keagler, and Joaquin Garcia. They began handbilling, home calling, and talking to employees.

The Union filed its first petition, on July 21, 1999. A hearing on the petition was conducted on August 4, 1999. The Union sent a letter dated August 8, 1999, to Richard Schuler identifying committee members. Pacheco hand delivered the letter to Richard Schuler. The letter identified Pancheco, McCoy, Berrios, Hooks, Keagler, Marin, and Garcia as members of the Union's organizing committee. The union campaign consisted of home calling, weekly union meetings, and handbilling. The Union translated some of the handbills in Spanish. Antiunion employees were also handbilling against the Union, but on different days of the week.

The election in Case 12–RC–8379 was set for September 30 and October 1, 1999. However, the Union withdrew its petition. Marrs testified that the committee found employees harder and harder to contact in home calling. Committee members were telling the union representative that the employees were scared and there had been threats made about the warehouse closing if the Union came in. Marrs testified that he also heard from employees that the Respondent's supervisors were telling them not only would the warehouse be closed, but also that the workers were going to lose their jobs, and that the Company would not negotiate with the Union. Marrs heard from the employees that the supervisors made these statements in meetings and one-on-one conversations.

After 3 months, Pacheco and McCoy called Marrs again. They felt that the promises that Respondent made to employees during the campaign had not been kept. Respondent was supposed to take a look at the wages, the so-called productivity average that they had maintained, and the attendance policy. When it did not happen, they called the Union to try again. They told Marrs the Respondent was starting to change all the rules again.

Marrs and his group of employee organizers started building a committee again. They began getting cards signed and home calling card signers. They tried to keep it underground as long as possible. Pacheco home called 3 days per week, Hooks home called about 5 days per week. Miguel Marin, Jefferson Jules, Joaquin Garcia, and McCoy, home called sporadically. There were other union representatives helping Marrs going on home calls. They also handbilled to inform employees that they had a right to a witness when they had to talk to their supervisor about a matter that could lead to discipline.

Marrs filed some EEOC charges for some for the Hispanic employees and a religious discrimination charge for Jefferson Jules. The Right to Sue Letters relating to the EEOC charges were issued in about July and August 2000. A class action race discrimination lawsuit was filed against Respondent by employees on October 23, 2000. The named plaintiffs in that case were Garcia, Berrios, Pacheco, McCoy, Marin, and Lazarus Heredia.

During 2001, including March–April, the campaign continued to consist of home calling, conducting union meetings, handbilling, and talking to workers about the Union. Pacheco, Hooks, Garcia, Marin, McCoy, and Jules continued to be active in the organizing efforts. On October 12, 2001, the Union filed another petition, Case 12–RC–8616, to represent Respondent's

employees at this location. The DD&E issued dated December 7, 2001. After the petition was filed, the Union continued to home call, hold union meetings and continued to get names of employees from the committee. They met with employees at their homes, a hotel, or neutral places. On January 3 and 4, 2002, an election was held and the employees decided against union representation. The Union filed objections to the election which were withdrawn prior to the hearing.

B. The 8(a)(1) Allegations

1. Paragraph 5(a) of the consolidated complaint alleges that in late June, July, and early August, Supervisors Joe Cox and Mike Fitzpatrick disparately applied Respondent's no-solicitation/no-distribution rule

The General Counsel concedes that the rule is not unlawful but contends that it was discriminatorily applied to the posting of union materials.

The rule is as follows:

> SOLICITATION BY ASSOCIATES
>
> Publix respects the right of all associates to our individual beliefs, opinions, memberships and associations. We respect and encourage the sharing of ideas and opinions among fellow associates. As long as we abide by the Rules of Unacceptable conduct (see especially No. 18, neglect of work responsibilities) we may share opinions, seek support for organizations which we support or in which we are members, discuss social or job-related issues, and engage in similar activities with fellow associates at any time.
>
> We must insist, however, that any such communications not disturb or interfere with the shopping experience of our customers in any way. (For example, we should never carry on a personal conversation with another associate in the presence of a customer in the store.)
>
> We must also prohibit any solicitations for commercial purposes (e.g. sale of magazines, life insurance, or merchandise) on company premises.
>
> Finally, we must prohibit the distribution of literature at any time for any purpose in working areas of the facility

It is undisputed that Respondent permitted employees to post material for the sale of automobiles, boats, and other items. Bulletin boards are located in the garage, cafeteria, maintenance locker room, front docks, by the shipping and receiving offices, and in the dispatch office. Material was also posted on the glass window of the shipping office.

Alleged discriminatee Luis Pacheco testified that he checked the bulletin board by the timeclocks daily and saw items for sale of homes, cars, and rims posted on the bulletin board. He observed that in 1999 prounion material was posted but would disappear. On one occasion, Pachecho posted union material next to antiunion literature. On one occasion in August 1999, Pachecho saw Warehouse Superintendent Joe Cox tear union material down from the glass window of the shipping office. Pachecho testified also that he observed other employees post antiunion material on the bulletin board but that only the union material was removed.

Former employee Domingo McCoy testified that in July to August 1999, he observed employees posting notices of items for sale on the bulletin boards. Current employee Joaquin Garcia testified that he observed then Night-Shift Department Head Mike Fitzpatrick remove old antiunion literature and put up new antiunion literature. He observed that the union materials would disappear from the bulletin boards. Richard Schuler the former distribution manager for the Miami warehouse from 1995 to mid-2000, admitted that he told supervisors to remove union literature from the bulletin boards and that the supervisors complied with these orders. Current Dispatcher Superintendent Fitzpatrick testified that he removed union material from the bulletin board outside the selector's office that is used for production information and not for communications. The General Counsel contends that the evidence establishes that Respondent allowed other nonwork-related solicitation that did not involve the Union to be posted on company bulletin boards. However, the supervisors openly removed union material from bulletin boards, thus, conveying the message that the union postings would not be allowed. She notes that the no-solicitation/no-distribution rule does not say that only company-oriented information is permitted on the bulletin boards. She contends that the refusal to permit the posting of prounion material by Respondent was violative of Section 8(a)(1) of the Act citing *Heartland of Lansing Nursing Home*, 307 NLRB 152, 160 (1992).

Respondent contends that consistent with the solicitation policy, it removed both union and antiunion material from the bulletin boards. It contends that it is significant that not one of the three witnesses (Garcia, McCoy, and Pachecho) testified that any of the antiunion materials placed on the bulletin board were placed there by any of the antiunion employees. He notes that the only testimony shows that it was management and not employees who placed the antiunion materials on the bulletin boards. Respondent concludes that the General Counsel did not, therefore, prove a factual case of disparate treatment. Respondent contends that the legal question presented is whether an employer can post antiunion literature through its managers on a company-owned bulletin board while excluding employees from placing prounion literature on the same company-owned bulletin board, citing *Hale Nani Rehabilitation*, 326 NLRB 335, 336 (1998), where the Board held that an employer's valid rule against employee distribution is not rendered unlawful because the employer chooses to use its own premises to engage in its own distribution.

I find that Respondent violated Section 8(a)(1) of the Act by its disparate enforcement of the no-distribution rule against prounion postings while permitting postings for the sale of various items such as automobiles, dinner tickets, and the like. *Heartland of Lansing Nursing Home*, supra; *Holly Farms Corp.*, 311 NLRB 273, 274 (1993); *Bon Marche*, 308 NLRB 184, 185 (1992). The *Hale Nani Rehabilitation* case, supra cited by Respondent dealt with a different issue which was the alleged disparate treatment by the employer which posted its own antiunion literature while not permitting the posting of prounion literature. I accordingly do not find it dispositive of the issue in the instant case.

2. Paragraph 5(b) of the consolidated complaint alleges that on/or about late July or early August 1999, Respondent by its Supervisor Alvin Pratt at Respondent's facility threatened employees with plant closure if they selected the Union as their bargaining representative

Domingo McCoy, a former forklift operator on the night shift testified he heard Pratt talking to about seven or eight employees sometime after the petition was filed in 1999. McCoy testified he (McCoy) had been giving out union authorization cards to some new employees. McCoy placed the conversation at between 12:30 and 1 p.m. prior to the start of the night shift. He testified that employees Garcia, Bessios, and Perry were some of the employees in the group. McCoy testified that Pratt said that the group should:

> be careful how we voted and to make the right decisions because they would start shipping work out of the warehouse to nearby warehouses until we didn't have enough work to . . . justify our plant to be open. That we wouldn't have enough work to be open because they would start shipping out our work out of the warehouse.

Current employee Garcia testified that in late July or early August 1999, he heard Pratt talking to a group of selectors and motor operators and tell them, "if your union came in, probably we close the warehouse."

Pratt was not called to testify and his absence was unexplained. Accordingly the testimony of McCoy and Garcia on this matter stands unrebutted on the record. Respondent defends against this allegation by attacking the credibility of McCoy's and Garcia's testimony and citing purported inconsistencies in the testimony of these two witnesses. He notes that on cross-examination, McCoy testified that he remembered employees asking Pratt questions during this conversation but could not recall the subject matter of those questions. He also notes that at the hearing McCoy named "several" (three) of the employees present at the conversation but in his May 19, 2000 affidavit, McCoy stated he could not remember who was present. Respondent contends that Garcia's testimony is likewise incredible as Garcia testified he saw Pratt talking to a group of employees including McCoy and heard Pratt threatening to close the facility as he approached and that no one asked a question and the employees all left. Respondent notes also that Garcia testified that supervisors did not want to talk about the Union in front of him and McCoy on that date. Respondent also contends that it is highly unlikely that Pratt, after receiving training from highly qualified trainers by Labor Relations Manager Mark Codd and Labor Relations Specialist Curtis Palmore, would have told associates that the Company would close the facility if the union is elected.

I find based on the unrebutted testimony of McCoy and Garcia, a current employee, that Supervisor Pratt did tell the employees that the warehouse would be closed or the work would be removed if the Union were selected by the employees as their collective-bargaining representative. Although I note some inconsistencies in the testimony of these employees, I credit their testimony that Pratt was threatening plant closure and/or the removal of work as a consequence if the Union were selected. I do not find that their testimony is rebutted or diminished in the weight to be accorded it as a consequence of any training in labor relations that may have been administered. I find rather that it is more likely that Pratt was passing on this threat to employees which he had in some fashion been apprised of by management.

I find that Respondent violated Section 8(a)(1) of the Act by the threat of plant closure made to employees by Pratt. *Springs Industries*, 332 NLRB 40 (2000); *Dlubak Corp.*, 307 NLRB 1138, 1143, 1152 (1992); *Electrical South, Inc.*, 327 NLRB 270 (1998).

3. Paragraph 5(c) of the consolidated complaint alleges that in/or about late July and in/or about September or October 1999, Respondent by Desmond Tice, Respondent's day-shift department head threatened to deny employees employment opportunities if they selected the Union as their bargaining representative

This allegation involves alleged threats by Tice to employees that if the Union were selected, the employees would no longer be permitted to become truckdrivers as the petitioned for unit does not include truckdrivers. Entry-level positions in the warehouse are sanitation employees and selectors. Selectors then move into forklift positions. Employees also usually move from night shift to day shift. Truckdriver positions are considered very desirable by employees. Respondent posts signup lists for truckdriver positions in the first 2 weeks of January and July. A significant number of selectors and forklift drivers (15–20) signup each time. The driver positions are awarded by seniority.

Employee Luis Pachecho testified that in August 1999, he heard Tice telling employees in the cafeteria during a break that:

> If the Union were to come in, that they would not be able to go to the driver positions and that if the Union were to come in, that seniority would not exist anymore. He was talking about the drivers not being able to vote in the election and that because the drivers were not part of the bargaining unit, that employees would not be able to go into those positions afterwards if the Union were to come in. Tice said seniority would go right out the window.

Garcia testified he heard Tice talking with Wendell Braye, McCoy, Steven Williams, and three selectors while they were standing around the HD line around the dog food section. Garcia testified the heard Tice say,

> . . . do you want to work in the warehouse the whole of your life? So the only way to get off of that warehouse is to become a truck driver. And if your guys go union, you guys not going to get the truck because truck drivers are not going to be in the Union.

Tice testified that he did not recall this discussion in the cafeteria but he did remember telling employees that truckdrivers would not be in the bargaining unit, after the decision regarding who would be in the unit. The General Counsel contends that Pacheco and Garcia were credible witnesses and that their testimony withstood lengthy cross-examination and should be

credited over Tice's testimony that he did not recall that any employees asked him questions.

Respondent notes that the General Counsel offered the testimony of Garcia, McCoy, and Paecheo in support of this allegation. Respondent notes that there appears to have been two separate conversations involving this allegation. In the first alleged conversation Garcia and McCoy were involved. Garcia testified that in July or August 1999, Tice who was with Wendell Braye, told him McCoy, Steven Williams, and three selectors, that the only way to get out of the warehouse was to be a driver and that if there were a union, employees would not become drivers as drivers are not in the bargaining unit. McCoy, however, testified that Tice said that the Company would hire other trucking companies to supplement the current trucks to keep the associates in the warehouse. Respondent contends that not only do Garcia's and McCoy's testimony on the same alleged conversation differ but McCoy did not testify that Tice made any threat related to the Union as he did not say Respondent would outsource the drivers' duties if the Union was elected.

Respondent notes that the second conversation allegedly occurred between Tice and unidentified associates in the cafeteria. Pacheco testified that he overheard Tice tell associates in the cafeteria that if the Union came in there would be no more seniority in reference to the driver positions. Respondent contends that the testimony of Garcia, McCoy, and Pacheco was either not credible or wholly insufficient to support a violation, and that conversely, Tice's testimony was clear, credible, and consistent as he denied each one of the alleged conversations. Respondent contends that the only conversation that could have related to these allegations is that Tice told the employees that drivers were not in the bargaining unit. Respondent also contends that in training Tice had received, he was instructed not to threaten employees.

I find that Tice did threaten the employees as set out above that they would lose the opportunity to become truckdrivers if the employees selected the Union as their collective-bargaining representative. It does appear as noted by Respondent that there were two separate conversations involved here, one involving both Garcia and McCoy and the second overheard by Pacheco. Contrary to the Respondent's contentions I find that the testimony of McCoy and Garcia was credible although I note that McCoy testified that Tice had told the employees that the Respondent would hire another trucking company to make the deliveries as the unit employees would no longer have an opportunity to become truckdrivers. I credit McCoy in this regard although Garcia did not testify to this statement. I do not agree with Respondent's contention that McCoy did not attribute the outsourcing of the drivers' duties to the Union's election. Rather I find that this was implicit in McCoy's testimony. I also credit Pacheco's testimony as set out above. I note that Tice did not clearly deny that these conversations occurred but rather testified he did not recall them. I also note that Respondent did not call Supervisor Wendell Braye or Steven Williams to testify concerning the conversation who would have been favorably disposed to Respondent's position to corroborate Tice's version of the conversation. While I note that truckdrivers were not to be included in the bargaining unit, this did not automatically or inevitably preclude employees who were in the bargaining unit from being given an opportunity to become truckdrivers. I conclude that Tice did threaten employees in two separate conversations as set out above that if the Union were selected, they would lose the opportunity to become truckdrivers. Respondent violated Section 8(a)(1) of the Act by the issuance of these threats by Tice. Prediction of effects of unionization must be based on objective fact and were clearly not based on objective facts in this case *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969); *Debber Electric*, 313 NLRB 1094, 1097 (1994).

4. Paragraph 5(d) of the consolidated complaint, as amended at trial, alleges that on/or about October 27, 2000, Respondent by Jack Mosko, threatened to discharge employees because they engaged in concerted protected activities by trying to assist fellow employees to address work-related issues with Respondent

Current employee Joaquin Garcia and former employee Tarvis Hooks testified concerning this allegation. Jefferson Jules was an employee who was a Seventh Day Adventist and was having problems with getting 40 hours of work per week because he came in late on Saturday and Sunday. He discussed his problem with Garcia and Hooks. On October 27, 2000, before they punched in for work Jules discussed his problem with Hooks who advised him to talk to Distribution Manager Jack Mosko but to take a witness because management could twist his words and that dishonesty automatically terminates employees. Jules said he wanted to take Garcia and Hooks with him. Jules wanted to be able to work another day to resolve his problem. Jules, Hooks, and Garcia decided to wait until after the warmup meeting conducted by Supervisor Jose Diaz. Warmups consist of 2 to 5 minutes of stretching and exercise at the start of the shift in preparation for the work which involved physical exertion. During the warmup periods the supervisor discusses with the employees anything necessary to apprise them of concerning the shift or upcoming problems or information to be passed on to the employees. During the warmup meeting Supervisor Jose Diaz announced a new procedure for working overtime. It provided that employees who wanted to work overtime must request it a day in advance and would only be permitted to work 1 day of overtime per week. After the warmup Hooks asked Diaz if Jules, Garcia, and he could go see Mosko. Garcia saw Hooks and Jules talking to Diaz. He joined them and said he would go with them. Diaz said go ahead. When they arrived at Mosko's office they asked to see Mosko. Warehouse Superintendent Joe Cox was also there. They sat down and Mosko asked Jules to go first. Jules said he had a complaint and began to talk about his problem. Mosko interrupted and asked Hooks and Garcia why they were there. Garcia said, "I came here because Jefferson Jules and Tarvis Hooks told me that we need to see you about . . . Jefferson's problems." Hooks said he was there as Jules' witness. Mosko said he did not need them and sent them back to work while Jules remained to discuss his problem alone.

About 30 minutes later, Hooks and Garcia were called back into Moskos' office. Mosko, Cox, and Diaz were present. Mosko asked why they had come to his office with Jules. Gar-

cia said he came to discuss Jules' problem. Hooks said he came to be a witness. Mosko said they had told Diaz they were going to talk about overtime and that this was a very serious problem because they had been dishonest and that normally Respondent terminated employees for dishonesty. Garcia testified that Mosko said you could be fired or given a management statement which is a note to file of some type of unacceptable conduct. Hook testified that normally we terminate you for dishonesty but in this case your supervisor will get with you and give you some counseling statements. Garcia and Hooks attempted to explain that they had not given Diaz a reason for their request to talk to Mosko and that Diaz had assumed the request was made to discuss the new overtime policy which he had been advising the employees of at the warmup meeting. Diaz contended that Hooks had asked about overtime and that James Roger another supervisor was there. Garcia and Hooks contended that Roger was not there. Mosko told them to return to work and that their supervisor, Michael Collins, would get with them later about the decision on the manager's statement.

The General Counsel contends that Mosko's version was consistent with Hooks and Garcia up to a point. Mosko testified he said, "Well guys, with the facts I have, the only conclusion I can make is that you guys are playing a game and you are being dishonest . . . there's been a few people in the past, based upon the severity of the breaking of the rule that have been terminated . . . but to memorialize what just occur here, I said Jose, who's their immediate supervisor, will issue them a level of counseling . . . ." However, Mosko also testified that at the end of the meeting there would be no counseling because there had been a misunderstanding. Jace Diaz was not called as a witness and Cox did not testify about the meeting. Garcia testified that about an hour after this meeting, Cox came to him and told him that he believed Garcia was telling the truth and had told Mosko this. Hooks testified that Cox never apologized.

Respondent relies on the testimony of Mosko that he questioned Hooks and Garcia as to why they were in his office to discuss Jules' problem and that they contended they wanted to be witnesses and that he then told them to go back to work as this was not an investigatory interview. After discussing Jules' problem, Mosko then questioned Diaze who said that Garcia and Hooks told him they wanted to see Mosko about the overtime policy he had just discussed with the employees. Mosko testified he then called Garcia and Hooks back to his office because he thought they had lied to Diaz about the reason they had asked to speak to Diaz. When he told them Diaz had told him they had asked to see him about the new overtime policy, Garcia and Hooks did not respond. He then believed that Hooks and Garcia had lied to Diaz as by their own admission they wanted to act as witnesses for Jules. He then informed them they "could" receive counseling for dishonesty. Only at that point did Garcia and Hooks tell him they had given Diaz a reason for their request to see Mosko. When Mosko questioned Diaz, he admitted it was possible that he had assumed that Garcia and Hooks had wanted to see Mosko about the overtime policy. Mosko testified he told Garcia and Hooks there was a misunderstanding and that there would not be any discipline and neither of them did receive any discipline.

I find that Respondent violated Section 8(a)(1) of the Act by the threat of discipline issued to Garcia and Hooks by Mosko. To the extent that the versions of this incident differ I credit that of Garcia and Hooks. I note that neither Diaz who did not testify nor Cox who testified were questioned about what occurred at these meetings. Clearly Garcia and Hooks were engaged in protected concerted activities when they attempted to accompany Jules to discuss his work schedule problem. When Masko ascertained that the problem was one of Jules' work schedule and since this was not an investigatory review, he sent Garcia and Jules back to work in accord with *Epilepsy Foundation*, supra. However, the record is clear even under his version that Mosko did threaten Garcia and Hooks with discipline including discharge while they were attempting to help their fellow employee, Jules. It appears that Masko was so concerned about their engagement in protected concerted activities that he rushed to judgment in this case and responded with a threat of discharge which was clearly an overreaction to their mere request to meet with him.

5. Paragraph 5(b) of the consolidated complaint alleges that on/or about March 15, 2001, Mosko threatened employees with discharge because they engaged in union activities and harassed employees by requesting that employees report to Respondent, the union activities of other employees

This allegation invokes an alleged threat of discharge by Mosko to Luis Pacheco for home calling and alleged harassment of employees by Mosko by his request that employees report to Respondent the union activities of other employees.

In late 2000 and early 2001, employees were actively campaigning in support of the Union for the upcoming election scheduled for January 3 and 4 2001. They passed out union fliers, obtained signed authorization cards, wore union T-shirts that said, "Vote yes for the Union" and began home calling on their fellow employees on behalf of the Union in February 2001. Hooks testified that Respondent posted two memos to employees in the warehouse in opposition to the home calling. The first memo to employees stated that the prounion employees were harassing employees at their homes. It was only up for a day or two and was removed before Hooks was able to copy it. The second memo, dated February 2, 2001, specifically mentioned Steve Marrs and Hooks and stated that they were harassing employees. Pacheco testified that during this period he made the home calls almost every day he worked and made about 25 home calls each week.

Pacheco was called to Joe Cox's office in March 2001. Cox said Mosko wanted to see him. When he arrived at Mosko's office Cox walked in with employee Henry Ferguson and motioned for him to speak. Ferguson told Pacheco he did not want him to bring the union people to his house anymore. Pacheco told Ferguson they had discussed this on the floor and asked why Ferguson was bringing it up in front of management. Ferguson continued and became agitated and threatened Pacheco that he would turn the dogs on Steve Marrs and Pacheco if they came by his house again. Mosko stated that they were all adults and could settle this in a civilized manner. Pacheco told

Ferguson that if he had told him this on the prior visit, they would not have come by his house a second time.

Mosko then pulled out a folder and told Pacheco if anyone does anything to misrepresent Publix outside the workplace, those are ground for termination. He then told Pacheco a story that he had fired two employees for something they did outside of work. He then read a statement from the Company's rules that if anyone "harasses someone, those are grounds for termination." Pacheco testified that Mosko told him "that it applies to the Union as well and I'm sure you're aware of this Luis, that it applies to you guys as well." Pacheco testified that Mosko did not make a similar comment to Feerguson. Pacheco testified that Mosko also said if anybody harasses others or there are any problems either sides should come to him. In reference to a question by Ferguson as to how long the Union could campaign, Mosko told him there was no time limit. He also said that the Union was attempting to chop Publix off at the knees and that all of the lawsuits against the Company were caused by the Union trying to harm the Company. Mosko also said that anyone who supported something like that should be ashamed of himself. Pacheco testified he asked what they should be ashamed of, protecting the little people against the Company. Cox then said that Publix had settled the women's lawsuit and Pacheco replied the Company settled it because they knew they were wrong.

Respondent contends that Mosko never actually threatened Pacheco with termination for his union activities but that Mosko merely reminded Pacheco that all associates, including Pacheco, are subject to Publix's rules of unacceptable conduct regarding conduct outside the workplace regarding Ferguson's complaint that Pacheco was harassing him. Respondent also contends that Mosko did not tell employees to report the union activities of other employees. Mosko denied telling Ferguson or Pacheco that if they misrepresented Publix outside the workplace they would be terminated and denied threatening Pacheco with discipline for the incident with Ferguson and denied singling Pacheco out when Mosko referred to company rules. Respondent therefore contends that the General Counsel has not established the threat of discharge and harassment to substantiate this allegation.

I find that Mosko's remarks at this meeting were violative of Section 8(a)(1) of the Act as they constituted a threat of discharge against Pacheco for his engagement in protected concerted activities in making home calls on behalf of the Union. Although the remarks were couched in generalized language, it is clear that Mosko's remarks were directed at Pacheco in a veiled threat of discharge for engaging in the home calling. There was no evidence that Pacheco had actually harassed Ferguson despite Ferguson's conclusion which was not based on any substantive fact in this record. Moreover, the threats of discharge by Mosko were interspersed with Mosko's disparaging remarks against the Union and its supporters leading to the inevitable conclusion that the threats were being issued to Pacheco and other employees who engaged in like activity in support of the Union. I also find that Mosko's request that the employees come to him if they are harassed which was directed to Pacheco and Ferguson was violative of Section 8(a)(1) of the Act as there is no evidence in this record that any employees were being harassed and thus constituted a request by Mosko that employees report the union activities of other employees to him. *Bloomington-Normal Seating Co.*, 339 NLRB 191 (2003).

6. Paragraph 5(g) of the complaint alleges that in or about mid-October 2001, on a date not more specifically known Respondent, by Luis Funes, at Respondent's facility, threatened the employees with discharge and unspecified reprisals in retaliation for their concertedly filing a lawsuit against Respondent concerning their terms and conditions of employment

At the time of the hearing, Edgar Linarte was employed as a motor operator on the day shift and had been employed by Respondent for 9 years. He was one of a group of employees who went to the Equal Employment Opportunity Commission (EEOC) about the warehouse operation. The group included Luis Pacheco, Joaquin Garcia, Luis Marin, and Eddie Herrera. They later hired an attorney who filed a class action lawsuit on October 23, 2002, with the following employees chosen by the attorney as named plaintiffs: Joaquin Garcia, Felix Berrio, Luis Pacheco, Domingo McCoy, Miguel Marin, and Lazarous Heredia and on behalf of all others similarly situated.

The managers and supervisors were aware of the lawsuit. On an occasion, when he was working by himself Linarte was approached by Supervisor Luis Funes who told him to stop so they could talk. No one else was in the area and they spoke in Spanish. Funes told him the supervisors knew he had filed a complaint against the Company and were going to talk to him. Funes asked why he was involved and Linarte told him because of the discrimination against Hispanics. Funes told him the "demand" was not against the Company, but the supervisors. Funes told him the supervisors were going to talk to him and warned that if the workers did not win the lawsuit, "the Company could dismiss them for being dishonest." Linarte told his coworkers at breaktime what Funes had said. Later that day as he was clocking out, Funes approached him and told him he had told Linarte this as a friend and not to tell anyone else. A couple of months later Joe Cox called him and told him to call the Publix attorneys as they needed to talk to him urgently about labor-related problems. Linarte testified he did not call because he was humiliated.

I credit the unrebutted testimony of Linarte as Funes was not called to testify and find that the warning issued by Funes constituted an unlawful threat of discharge against Linarte in violation of Section 8(a)(1) of the Act. It is clear that Linarte's participation in the filing of the lawsuit was protected concerted activity arising out of the employment relationship, was a matter of common concern of his fellow employees similarly situated and involved national labor policy. *Country Club of Little Rock*, 260 NLRB 1112, 113–114 (1982).

7. Paragraph 5(i) of the complaint alleges that since on/or about mid-November 2001, including November 29, 2001, and on other dates not presently known, Respondent by various security guards, whose names are unknown, prohibited employees from parking in Respondent's parking areas in order to discourage them from distributing prounion handbills

Parking rules are covered under Respondent's rules of unacceptable conduct rule 25 states that failure to comply with rules established by individual stores or departments is unacceptable conduct. Parking rules are listed as an example. This allegation involves the alleged interference by Respondent's guards with parking by prounion employees near the main gate on Respondent's property while they are handbilling. There are 21 security guards. Richard Thomas is the facility security supervisor. Abbeo Bermundez and Katrina Cumer are also security guard supervisors. Thomas reports to Derrick Jackson, loss prevention specialist. The security department reports to Keith Hunter who is the head of loss prevention and oversees all security in the Miami facility and who has an office in the Miami complex. Hunter reports to John Lee of the corporate office in Lakeland, Florida.

There are several gates at the complex. This allegation involves the main gate where there is a security post with a guard shack. There is a parking area west of the guard shack and the main parking area is to the east of the parking lot. The employees handbilled between the outside part of the gate and the street.

Prior to the filing of the petition in 2001, employee handbillers including Marin, Garcia, and Hooks parked within the gates in the employee parking lot about 30 yards from the guard shack and then walked back to the area where they handbilled on behalf of the Union. Employees who handbilled against the Union also parked there. The union handbillers generally met there from 12 to 12:30 p.m. to handbill.

Garcia testified that the area where they parked was the guest area. On about November 29, 2002, Garcia passed through the main gate and parked in the guest area and got out of his vehicle to handbill. The security guard asked him if he was going to work. Garcia testified that he told the guard he was going to handbill and that the guard told him he could not park there and must go outside. Garcia testified the guard was a black man but that he could not identify him. Garcia then moved his car across the street to a gas station and never again attempted to park on Respondent's property when he was handbilling. Garcia also saw Hooks try to park in the lot and be turned away by the guard. Garcia also testified that after this incident he observed employees Renzo Paridi, Jean Raphael, Bruce Jenkins, and Melvin Henderson, handbilling against the Union and that they parked in the same area where he had not been allowed to park on November 29. Marin and Hooks testified they were not permitted to park in this area on November 29, 2001, to handbill. Marin parked by the gas station across the street from the Publix warehouse. Hooks did the same. Hooks testified that after November 29, he saw antiunion employees Renzo Parodi, Roy Joseph, and Bruce Jenkins park in the area by the guard shack. Pacheco testified that in November he saw antiunion employees Ray Joseph and Kenneth Munning park in the visitors area by the guard shack. He also observed that Garcia, Hooks, and Marin parked across the street while handbilling. Similarly, Union Representative Steve Marrs testified that he observed antiunion employees park inside the gate near the guard shack while prounion employees were parking across the street. Security guard Claude Eligon testified he was on duty at the main gate on November 29, 2001, but that he did not notice where anyone parked.

The General Counsel contends that its witnesses should be credited over Respondent's. She notes that Garcia and Marin are current employees and contends that all of the General Counsel's witnesses were consistent in their testimony that Respondent's guards had forced the prounion employees to park across the street which put them at a disadvantage in reporting to work after handbilling and that these actions by Respondent's guards are attributable to Respondent and were violations of Section 8(a)(1) of the Act.

Respondent notes certain discrepancies in the testimony of employee witnesses Garcia, Marin, Pacheco, and Hooks and contends that they were not credible and that the testimony of Union Representative Marrs was not credible and notes that the employees did not complain to supervisors concerning restrictions imposed on them with respect to parking their vehicles near the guard shack in order for them to handbill on behalf of the Union. Respondent contends that the testimony of guard supervisor Richard Thomas and security guard Eligon was credible and that this allegation should be dismissed.

I find that Respondent violated Section 8(a)(1) of the Act by its prohibition of prounion employees Garcia, Marin, and Hooks from parking on the Publix warehouse parking lot to handbill on behalf of the Union. Although as noted by Respondent there were discrepancies in their testimony, I find that the overall substance of their testimony supports the conclusion that Respondent through its security guards prohibited the prounion handbillers from parking on its property for purposes of handbilling while permitting antiunion supporters among its employees to park on its parking lot thus placing the prounion employees at a disadvantage by requiring them to park across the street. I found the testimony of Marin and Garcia both, current employees and Hooks and Pacheco and Union Representative Marrs were mutually corroborative and credible. I credit them over the testimony of Thomas and Eligon. I find that the security guards were Respondent's agents under Section 2(13) of the Act and that their conduct in prohibiting prounion employees from parking on the parking lot while handbilling on behalf of the Union was chargeable to Respondent and violative of Section 8(a)(1) of the Act as it unlawfully interfered with and restrained them from their Section 7 right to engage in protected concerted activities. *Solutia, Inc.*, 339 NLRB 60 (2003).

8. Paragraphs 5(f) and (r) alleged threat of discharge issued by Supervisor Luis Funes on/or about February 7, March 12, and May 29, 2002

Miguel Marin, a current employee at the time of the hearing testified that in January or February 2002, "right after the election" (held on January 3 and 4, 2002) Supervisor Luis Funes

said to him, "Miguel, now you're only going to have forty-three people left because they're going to be fire two other people from your Union." When Marin asked Funes how he knew this, Funes started laughing and "said he knew" Marin placed this as after the election in either January or February (2002). Shortly thereafter, two union supporters, employees Marcus Bailey and Perry (Blocker) Nimrod, were discharged on February 7, 2002.

Marin also testified that shortly before employee Tarvis Hooks was discharged in March 2002, Supervisor Luis Funes told him, "[T]hey were going to fire a big guy from the Union." A few days later, Publix fired Hooks. Marin placed this conversation three or four months after the election. He testified further that shortly thereafter Pacheco was fired. Pacheco was discharged on March 15, 2002. Hooks was reinstated in October 2002, following the settlement of an unfair labor practice charge he had filed regarding his discharge and was subsequently discharged again in December 2002. He had filed an unfair labor practice charge with the Board regarding his second termination which was pending at the time of the hearing in this case. Marin testified that following Pacheco's discharge in March 2002, Funes was out of the warehouse for 3 months working on United Way. On his return to the warehouse he saw Marin in the grocery office and speaking in Spanish said, "Miguel, what you doing here? You're still here?" Marin answered him in English and said, "Don't you see me? I still working here." So that others in the room could be aware of his reply.

I credit Marin's testimony which is unrebutted as Funes was not called to testify. I find that the various comments by Funes to Marin regarding employees Nimrod, Bailey, Pacheco, Hooks, and Marin were threats of discharge for their engagement in union activities and that Respondent thereby violated Section 8(a)(1) of the Act. I further find that Funes' statement to their being only forty-three people left was in reference to the 45 votes cast for the Union in the January 2002 election and created the impression of surveillance and that Respondent thereby violated Section 8(a)(1) of the Act. See *Gupta Permold Corp.*, 289 NLRB 1234, 1247 (1988).

9. Paragraphs 5(k) and (l) of the complaint allege that in or about December 2001, Second-Shift Department Manager Josue Cardona and Assistant Department Head-Grocery Shipping Keith Hankerson threatened employees with loss of jobs as alleged in paragraph 5(l) and that they would not be able to address grievances to their supervisors as alleged in paragraph 5(k) if the Union were selected as their collective-bargaining representative

In support of these allegations, Garcia testified that in December 2001, shortly before the election held in January 2002, Josue Cardona, who is the department head of night-shift operations and Keith Hankerson the assistant department head spoke to the employees during the warmup meetings held at the start of the shift. Normally these warmup meetings were conducted by first-line supervisors. The supervisors used this time to bring the employees up to date on any job-related information or any occurrences on the prior shift. It was highly unusual for these meetings to be conducted by Hankerson and Cardona. However, they did so in response to the union campaign in order to educate the employees as to the reasons for the Company's opposition to the Union and testified that they were given "talk sheets" of information by Respondent's labor relations management to memorize each evening for delivery to the employees the next day.

Garcia testified that at the warm up meetings Hankerson told the employees that if they had a problem with their production percentages to see their supervisor who would fix it. Hankerson also said that if there was a union, the supervisors would not be able to do this. Garcia also testified that Cardona also told the employees that if they had a problem with their percentages to see their supervisor and he could fix it but that if the Union was there, they would not be able to do that. The percentages refer to the productivity of the employees. Hankerson admitted at the hearing that he did inform the employees that if they had a problem with their percentage and productivity level, they should come to their supervisor who could adjust it. Cardona testified he did not recall what he said at these meetings. The supervisory talk sheets were not introduced. I credit the testimony of Garcia which was admitted by Hankerson and not specifically rebutted by Cardona.

I find that the Respondent violated Section 8(a)(1) of the Act by Hankerson's and Cardona's statements to the employees that they would lose the right to adjust grievances with their supervisors if the Union were selected by the employees. I note that Garcia testified about the loss of benefits which was not alleged as a violation, but that he did not specifically testify that Hankerson or Cardona threatened them with loss of jobs.

10. Paragraph 5(m) alleges that in/or about mid- and late December 2001, Respondent by Jack Mosko and Mark Codd during meetings held at its facility threatened employees with loss of jobs and benefits if they selected the Union as their bargaining representative

There were three sets of meetings held by Respondent in its efforts to defeat the Union in the upcoming election set for January 3 and 4, 2002. The first set referred to as roundtable 1, was held on about December 12 to 14, 2001. The second set referred to as roundtable 2 was conducted on/or about December 26 to 28, 2001. The third set of meetings (the 25th-hour speech) was conducted December 31, 2001, and January 1 and 2 (2002). The first two sets of meetings were mandatory. The third was not. Pacheco, Marin, Garcia, and Hooks testified about these meetings which were conducted by Mosko and Codd. At these meetings Publix used a power point presentation with Curtis Palmore, Respondent's former human resources representative operating a slide projector for the power point presentation. Codd and Mosko each spoke to the employees at the meeting with Codd giving the major portion of the presentation. Codd and Mosko followed the power point presentation outline. They did not read verbatim from a script or statement.

Pacheco, Marin a current employee, Garcia, a current employee, and Hooks testified as to what was said by Mosko and Codd at these meetings. Their testimony differed in both substance and emphasis from that of Mosko and Codd at the hearing. They testified that Codd and Mosko stated in broad based terms that if the employees selected the Union as their collective-bargaining representative, the employees could be called

out on strike without notice of an employee vote on the decision to strike, could be replaced if they went on strike with no explanation as to what their rights as an unfair labor practice or economic striker to return to work immediately in the case of an unfair labor practice striker or to be placed on a preferential hire list in the case of an economic striker. Respondent's representatives at these meetings stated that the employees could lose wages and benefits and equated collective bargaining as a "gamble." Pacheco testified that on several occasions at these meetings Codd stated that they would start at zero at the commencement of any bargaining. The employees also testified that they were told their wages were frozen. Respondent's representative Curtis Palmore testified that the employees were told that wages and benefits would be frozen if the Union were selected to represent the employees. I note also that one of the scripts entered into evidence by Respondent states that employees will lose individual rights if they vote for the Union. There was also disparity between the employees' version and Respondent's witnesses version as to how collective bargaining works with the employees testifying they were told that employees could lose wages and benefits they already had, whereas Codd and Mosko testified they told the employees that in the event of bargaining, the employees' wages and benefits could go up or down or remain the same. In support of Respondent's antiunion position, employees were told the Unions were crooks and that Union Representative and Organizer Steve Marrs was paid $150,000 a year without regard to how much of that was actually salary or organizing expenses.

I recognize that there is a potential for misunderstanding by employees who are not familiar with labor law and whose first language is Spanish, as in this case. However, I am convinced that Codd and Mosko were giving the employees broad bush assertions that they could be forced out on strikes without a vote, could lose wages and benefits in bargaining, could lose individual rights, that their wages and benefits could start at zero, and that their jobs could be lost as a result of the Union's selection as their collective-bargaining representatives. I find Respondent violated Section 8(a)(1) by these statements.

11. The denial of Garcia's request for a witness

Paragraphs 6(a), (b), and (c) of the complaint allege that Tanya Brown, Respondent's human resource investigator denied the request of employee Joaquin Garcia to have a fellow employee present during an interview, that Garcia had reasonable cause to believe that the interview would result in disciplinary action against him and that Brown denied Garcia's request and conducted the interview.

It is undisputed that on May 27, 2002, Brown conducted a meeting with Garcia to investigate a formal complaint that had been filed by employee Renzo Parodi. Garcia testified that Brown told him she wanted two things from him, to be honest and accurate and Garcia said OK. Brown then asked him if he had told Sam Luciano or John Santa Maria "something." Garcia said he did not know what she was talking about and asked her to be more specific. He then asked Brown if this was an investigation and Brown said yes. At that point Garcia said, "I want a witness." Brown said, "Oh, you want a witness," Garcia said, "[Y]es. Brown said, "OK," but continued to ask him if he had said something about Parodi and a date. Garcia again told her, he did not know what she was talking about. Brown then said, "OK," and ended the meeting. Brown admitted to these facts at the hearing but contended she did not think Garcia needed a witness because Mosko had already conducted an investigation and had found no misconduct justifying any discipline.

Weingarten rights were extended to nonunion worksites in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000). Employees may choose a representative to be present on their behalf at an investigatory interview which may result in discipline. Accordingly Brown's undisputed refusal to permit Garcia to have a witness and her conduct of the interview which could have resulted in discipline was a violation of Section 8(a)(1) of the Act. Respondent in an attempt to repudiate Brown's conduct posted a memo which stated, "on approximately May 27, 2002, Human Resources Representative Tanya Brown failed to grant an associate's request to have a witness present during an interview. Ms. Brown's actions were contrary to Publix's policy and may have been unlawful under the National Labor Relations Act." The memo also stated that Publix would not interfere with the Section 7 rights of the employees in the future. In *Passavant Memorial Area Hospital*, 237 NLRB 118, 139 (1978), the Board held that to be effective the repudiation must be timely, unambiguous, specific and free from other proscribed illegal conduct and there must be adequate publication to the employees involved. In the instant case before me Respondent did not establish that all employees were adequately informed. I find Respondent's refusal to honor Garcia's request for a representative violated Section 8(a)(1) of the Act.

12. Alleged 8(a)(3) violations by the disciplines issued to Luis Pacheco and by Respondent's discharge of him

This portion of the complaint is concerned with the issuance of oral and written warnings to employee Luis Pacheco and his discharge. As part of the overall distribution process of the warehouse operation, the Respondent employs several categories of employees. It employs selectors who receive orders for product to be shipped to the stores served by the warehouse. It employs forklift operators who move the selected product to the loading dock and place it near the trucks which are to carry the product to the stores. It employs one loader per shift who loads the product onto the trucks and seals the trucks for the transport of the products. In the course of his duties, the loader will make adjustments as necessary such as to place overages on another truck when there is not enough space on a truck to carry all of the product that has been ordered by a store. The loader must route the delivery of these partial loads which may be required to be shipped on the same truck along with other product destined for other stores. The Respondent utilizes a progressive discipline system progressing from oral and written warnings to discharge for various infractions, performance problems, and attendance problems. At issue in this case is whether Luis Pacheco was discriminated against in the administration of discipline to him because of his engagement in protected concerted activities on behalf of the Union. At the time of his discharge in March 2002, Pacheco was an 8-year employee who had received favorable reviews for his job performance with the most recent review in January 2002, for the period of July

through December 2001. However, Pacheco had received oral and written warnings in the past and his ultimate discharge was purportedly based on these as well as the final alleged infraction for which he was discharged. The issues in this case were vigorously contested by the parties throughout the hearing and in the briefs of the General Counsel and counsels for the Respondent. Under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), the General Counsel has the initial burden to establish that:

1. The employees engaged in protected concerted activities;
2. The Respondent had knowledge or at least suspicion of the employees' protected activities;
3. The employer took adverse action against the employees;
4. A nexus or link between the protected concerted activities and the adverse action underlying motive.

Once these four elements have been established, the burden shifts to the Respondent to prove by a preponderance of the evidence that it took the adverse action for a legitimate nondiscriminatory business reason. In the instant case Pacheco was a leading union supporter well known to management who was a named plaintiff in a class action suit filed by several Hispanic employees against the Respondent alleging discrimination. He had handbilled employees at the warehouse and home called employees on behalf of the Union. Pacheco continued to hand bill the Respondent on behalf of the Union even after the election held on January 3 and 4, 2002. The record also shows that on one occasion a day prior to the issurance of a warning of Pacheco he had appeared before Manager Mosko in an attempt to represent an employee based on *Epilepsy*, supra. I conclude that Pacheco engaged in protected concerted activities on behalf of the Union and that Respondent had knowledge of his concerted activities. It is undisputed that Respondent took adverse actions against Pacheco by its issuance of the warnings against Pacheco and by its discharge of him. The evidence also supports a finding that the Respondent engaged in disparate treatment of Pacheco by its discipline of him for similar offenses of other employees that were tolerated by management. I find that based on the record as a whole as set out above the Respondent had animus against the Union and its supporters which had been openly expressed by Respondent's management and which had been manifested in its conduct wherein its management engaged in threats of loss of jobs and benefits. The unrebutted testimony of current employee Linarte established that Supervisor Funes had accurately predicted the discharge of employee Tarvis Hooks. Additionally, the close timing of the discharge of Hooks and Pacheco gives rise to the inference that they were discharged because of their union activity as predicted by Supervisor Funes. I conclude that based on the foregoing there is a nexus between the protested concerted activities and the adverse action underlying motive. Under *Wright Line* the burden has accordingly shifted to the Respondent to prove by a preponderance of the evidence that it took the adverse actions for a legitimate nondiscriminatory business reasons. *Manno Electric*, 321 NLRB 278, 280 at fn. 12 (1996); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1123 (2002).

Respondent's progressive discipline system is contained in Volume 4 of its managers reference library which is updated and kept in each department periodically. It provided that employees received a first documented oral counseling when an employee has an incident or pattern of unacceptable behavior in a single area of behavior. A second documented oral counseling may be issued to employees when they have an incident or pattern of unacceptable behavior unrelated to the first area. Employees received written counseling for a second incident of the same behavior, following an incident or pattern of unacceptable behavior related to the first area. Employees receive written counseling for a second incident of the same behavior, following an incident or pattern of unacceptable behavior after a second documented oral counseling has been conducted and occurs during the active time limits of a written counseling statement, and there is an incident, problem or pattern of unacceptable conduct requiring additional counseling that is likely to result in a final written counseling statement of the employee's termination. A final written warning is issued when the employee demonstrates any incident or pattern of unacceptable behavior and when during the active time limits of a final warning, an incident, problem, or pattern of unacceptable conduct occurs that would require additional documented counseling likely to result in the employees' termination. Discharge follows a final written counseling statement. The time limit for an oral counseling statement is 6 months from the date of counseling. The time limit for a written counseling statement and final warning is 1 year. The guidelines provide that a supervisor should be specific about the behavior when documenting counseling statements.

An attendance and punctuality policy is also contained in the managers reference library. The policy designates instances when an employee punches in between 4 to 7 minutes late as a "K-LATE". A "LATE" is 8 or more minutes after the starting time. Three "K-LATES" equal one "LATE." Employees are permitted five lates before receiving discipline and losing points on their evaluation. All employees are covered by this attendance and punctuality policy. Supervisors are to review attendance and punctuality of the employees they supervise once a week. Discipline is initiated when an employee has five lates in a rolling 6-month period.

Pacheco was a loader and an 8-year employee at the time of his discharge. He moved from the night shift to the day shift in late 1999 or early 2000. Initially, his start time was 4 a.m. and was later changed to 4:30 a.m.. On May 3, 2001, Supervisor Keith Thomas issued Pacheco an oral warning for tardiness. On the day prior to this, Pacheco had attempted to represent employee Domingo McCoy who had been called to the office. McCoy feared that he might incur discipline and asked Pacheco to serve as his witness in accord with *Epilepsy,* supra. However, Pacheco was sent back to work by Mosko.

The General Counsel does not dispute that Pacheco was late on the dates indicated on his May 3, 2001 discipline but contends that the supervisors were not following the policy consistently. Pacheco testified without rebuttal that none of his supervisors had reviewed his punctuality and attendance record with

him during that 6-month period. He testified that Josue Cardona had a practice of reviewing his punctuality and attendance record with him every 3 months and telling him how many occurrences he had before he would be subject to discipline. Keith Thomas took over Josue Cardona's position in late 2000. The oral warning issued by Thomas for tardiness on May 3 was noted by Thomas on the back of Pacheco's attendance report for 2001. Tice testified it was Respondent's policy and practice to review attendance and punctuality reports with employees periodically. Thomas admitted he did not do so. The General Counsel notes that April 20 was the date that Pacheco was late which put him over the limit and that Pacheco worked from April 20 to May 3, 13 days later, to issue discipline. The General Counsel contends that Thomas' failure to review Pacheco's attendance and punctuality record with him before he went over the limit is suspicious because Thomas testified he checked the attendance report weekly.

In January 2001, Thomas gave Pacheco his evaluation but did not sit down with Pacheco which is the normal practice. This evaluation covered the 6-month period from July to December. This evaluation does not mention punctuality. Additionally, Thomas told Pacheco he was excusing his K lates. There is no other evidence in the record as to whether other supervisors were excusing K lates. The General Counsel notes that this is evidence that supports the inference that there was no uniform policy being followed in this respect. Thus, the issuance of the evaluation to Pacheco with no mention of attendance or punctuality problems had the effect of lulling Pacheco into a false security that he was not at risk for discipline for attendance and punctuality shortcomings.

Pacheco received a written warning for tardiness on May 24, 2001, for arriving late for work on that date at 4:51 a.m., Pacheco admits he was late but contests this discipline on the ground that the prior one was unlawful. Additionally, Pacheco testified that Respondent was not administering its punctuality and attendance policy in a consistent manner. Pacheco observed other employees such as Henry Ferguson, Yvonne MacLain, Paul Kennedy, Daniel McDuffy, and Sheryl Quant punch in late for work and contends they were not disciplined as they were sufficiently late enough to have warranted termination if the supervisors had been applying the policy consistently.

Pacheco also testified that Henry Ferguson, who worked as a receiver and who opposed the selection of the Union, was scheduled to start at 3:30 a.m. and was late. This appears to be borne out by his attendance report. Mosko testified he was not late because a manager (who he could not identify) permitted Ferguson to come in on his day off. The General Counsel argues in brief that similarly antiunion employee, Paul Kennedy, a pest control lead person was scheduled to start at 3:30 a.m. but was late on May 21, 22, 23, and 25, 2001, when he punched in at 7:15, 6:26, 6:19, and 3:33 a.m., respectively. Mosko testified that Kennedy had the flexibility to start later. The General Counsel contends that Mosko's testimony is not credible because Kennedy's attendance and punctuality report shows that supervisors were holding him to a specific start time.

Based on the above, the General Counsel contends it has established a prima facie case. Pacheco a longtime, well-known union supporter, on the day before he received the May 3 oral warning had attempted to engage in concerted activity by going with McCoy to Mosko's office to represent him which established a nexus between Pacheco's concerted activities and the warning. The General Counsel also contends that an indication of pretext is the 13-day delay by Respondent in issuing the warning to Pacheco. The General Counsel contends she presented concrete examples of employees who deserved discipline under the policy and did not receive it. She contends Respondent seized on Pacheco's tardies as a pretext to terminate a Union activist as demonstrated by the far worse records of employees McDuffy, MacLain, Quant, Ferguson, and Kennedy. She accordingly contends the issuance of the May 3 and 25, 2001 oral and written warnings for punctuality were in violation of Section 8(a)(3). *New Otani Hotel & Garden*, 325 NLRB 928 (1998).

The General Counsel also contends that the issuance of the final warning to Pacheco on February 14 for a mis-ship was pretextual in violation of Section 8(a)(3). Following the election of January 3 and 4, 2003, Pacheco and Hooks who had been observers for the Union and Garcia began getting cards signed again in view of Supervisors Funes and Cardona in front of the timeclock while they were off the clock. A mis-ship is a quantity of merchandise that is put on the wrong trailer and goes to the wrong store. Prior to the fall of 2000, employees who had mis-ships were only issued a manager's statement and mis-ships were not subject to progressive discipline. After the fall of 2000, Mosko eliminated the manager's statement and employees went straight to an oral counseling statement. Mosko did not know if the employees knew about the change and considered this a management prerogative.

Pacheco testified concerning his extensive duties as a loader. Initially he reviews the load sheets on which the selectors have indicated where they have put their pallets. He posts the load sheets on the dock for the selectors, puts the numbers on the doors, sets up the ramps and calls for trailers to be removed if they are not to be used. He is in charge of the loading of the trailers and places pallet selects in the trailers. He signs the load sheet after he places them in the trailers. He obtains paperwork known as Pallet Recap which shows how many cases and pallets are going to specific stores. He determines whether there are any overages. A trailer holds only twenty-two pallets. Anything additional is an overage. He makes a route for the driver to deliver the overages. He then faxes the overage to dispatch and they send a driver to pick up the trailer.

While loading he matches the tags that have the door number, name of product, date, location of product, and store number to ensure the products are correctly delivered to the stores. He also checks Gia Russo which is merchandise from an outside vender which are placed on the dock for delivery the next day. He obtains bills of lading from the office, closes and seals the trailers, and faxes a copy of the delivery sheets to dispatch. The bill of lading is identical to the store order. If something is not delivered the store will call the warehouse. Pacheco then picks up the signage sheets and tells the supervisor (according to his testimony) that he was ready to go and for the supervisor to check the dock. He then punches out.

In the 2-week period prior to February 14, 2002, Respondent had reduced the number of doors available for use and forced

Pacheco to use the same doors more often than before which increased the traffic on the dock and limited the space available on the dock. This caused confusion on the dock.

Pacheco admitted that he loaded the wrong pallet of apple juice that had been prematurely bumped up to the dock early. It was for store 213 and had the same door number as store 679 which was scheduled to go out at 11:30 a.m., while store 213 was not scheduled to go out until 3:30 p.m. that day. Pacheco learned of the mis-ship when he observed the pallet inside the trailer for store 679 when it returned. As the trailer had to return to the warehouse, there was no extra trip or other loss as a result as Pacheco loaded it with the proper trailer and it was delivered to the store as originally scheduled. Later that day, Supervisor Wendell Braye asked Pacheco about the pallet and Pacheco told him it had been removed from the wrong trailer and loaded on the correct trailer and Braye said, "[G]ood work." The next day, Supervisor Thomas issued Pacheco a final warning for a mis-ship which the General Counsel contends was a "set-up." She notes the failure of Respondent to investigate who sent the apple juice up early. Thomas talked to Cox and Tice and did not inquire of Braye regarding the matter and Thomas testified it was necessary to give Pacheco a final warning after Cox and Tice told him discipline was necessary. Thomas admitted on cross-examination that the apple juice had been delivered to the store as scheduled and no special trip was necessary.

Pacheco met with Supervisors Cox, Tice, Thomas, and Braye and explained that the mis-ship was made as a result of the early bump up of the apple juice. Respondent offered no evidence as to why the apple juice was bumped up to the dock prematurely. This did not change the discipline.

Pacheco testified that on January 20, 2002, Tice and Braye blamed Pacheco for a mistake in the paperwork made by anti-union employee McDuffy but upon learning that the error was not made by Pacheco, Tice, and Braye did not take any action against McDuffy. The record evidence further shows that anti-union employees were the recipients of leniency for errors whereas Pacheco was not. Ronnie Mathis had received discipline for four mis-ships and under the progressive disciplinary system should have been discharged but his levels of discipline were backed up one step because supervisors were not administering the productivity standards consistently. McDuffy was not given a warning for an incident of error in paperwork that sent an entire truck to the wrong store. Manager Mosko contended this was not a mis-ship. Employee Jamal Harvey had a mis-ship and was not disciplined as did employee Tarvis Baker, who also was not disciplined according to the testimony of Leadman Marin. Marin also testified that Jerome Scott was not disciplined for mis-ship which occurred on March 25. The General Counsel contends that the foregoing demonstrates that the issuance of the final warning to Pacheco was pretextual. The General Counsel accordingly contends that the suspension and discharge of Pacheco was pretextual.

Night-Shift Leadman Marin testified that the day after Hooks was discharged in March he arrived at work around 12:30 p.m. and saw Pacheco who was some distance away. The dock was clear and Marin got his paperwork and commenced work. He opened the trailer door and put up his load sheets. Selectors arrived at 1:30 p.m. and loaders arrived at 2 p.m. He observed the Gia Russo was located by the scale and mixed in with "repack" (which is repackaged products). He walked to the office and on his way back observed two pallets of product for store 91 which were 2-feet high the same as the Gia Russo. He checked the sticker and went to the computer and learned that Vincent Dobson had selected the product. Marin then called Joe Dineen in dispatch about the two pallets. Dineen told him to put them in his overage. As he was doing the paperwork for the overage, Joe Cox, Jack Mosko, and Keith Hankerson walked by and inquired about the two pallets. He told them they belonged to the day shift and were going out on his overage. They told him to remove a sticker from each pallet and give it to Hankerson. Marin did not see the pallets before Pacheco left.

Pacheco testified that on March 13, prior to leaving, he told his supervisor, Thomas, that he was finished and Thomas said, "[L]et me walk to the dock with you." He did so and Thomas said everything was good. Pacheco punched out at 12:18 p.m.. Pacheco received a call from Garcia that evening who told him that all the supervisors were gathered on the dock and said that Pacheco had left some pallets out. Garcia also told Pacheco that Supervisor Funes told him that the supervisors had just got out of a big meeting and they were going to get rid of another one of them. Pacheco reported to work the next day as usual and was called around 9 a.m. to Tice's office. Tice told him that he had left some pallets for store 91. Pacheco told Tice he did not see the pallets and that they were not on the dock when he left and that Thomas had walked the dock with him. Tice suspended him and said someone would be in touch with him. After Pacheco did not receive a call, he called Mosko's office on Friday but was not able to reach him until the following Monday. Mosko told him the termination would stand.

In contrast, Supervisor Thomas testified he did not walk the dock with Mosko, had no conversation with Pacheco on May 13, did not and does not normally check the dock. I credit Thomas in this regard. Cox testified that he was walking the dock with Cardona and Hankerson and Marin approached them and asked why there were three pallets close to door 91 left on the dock. They did not know so Tice told Marin to take a sticker off the two pallets and give them to Tice to check. Dineen testified that store 91 did not report a shortage. The General Counsel contends that there would be no reason for Marin to approach the warehouse superintendent and department heads and that it is more likely that Mosko, Cox, and Tice heard of this from Hankerson and "swooped down to the dock." She further argues that Respondent rushed to judgment to rid itself of a leading union adherent. She also notes that no one talked to Dobson about the pallets. She notes that no one had ever been disciplined for leaving pallets on the dock before.

As set out above, I find that the General Counsel has established a prima facie case of violations of Section 8(a)(1) and (3) of the Act by the oral warning issued to Pacheco for tardiness on May 3, 2001. As this oral warning was an essential step for the imposition of the subsequent discipline, those disciplines were also violative of the Act.

In making credibility determinations, I have considered the record as a whole and the interests of the parties who testified in this proceeding. I have found credible the testimony of the

employee witnesses who have testified against their pecuniary interests such as the testimony of Garcia and Marin who remain as current employees and who testified adversely to the Respondent's position in this case. I credit the unrebutted testimony of Marin of threats issued by Supervisor Funes concerning the Respondent's plans to discharge prounion employees and the timing of the discharges of prounion employees which came about as predicted by Funes. I find these threats and the close-in-time discharges to be significant. I also find that the Final Warning for the mis-ship and the suspension and discharge of Pacheco were pretextual and that Respondent engaged in disparate treatment of Pacheco as it seized on his alleged infractions as a means to discharge him and rid itself of a leading union supporter while excusing the conduct of other employees for comparable offenses as set out above. I find whether Pacheco failed to see these pallets or they were placed on the dock after he left is not determinative. I thus conclude that Respondent has failed to rebut the prima facie case by the preponderance of the evidence.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The security guards were acting as agents of Respondent within the meaning of Section 2(13) of the Act.

4. The Respondent violated Section 8(a)(1) by:

(a) Disparately applying Respondent's no-solicitation/no distribution rule by precluding the posting of union materials.

(b) Threatening employees with plant closure if they selected the Union as their bargaining representative.

(c) Threatening to deny employees employment opportunities if they selected the Union as their bargaining representative.

(d) Threatening to discharge employees because they engaged in concerted, protected activities by trying to assist fellow employees to address work-related issues with Respondent.

(e) Threatening employees with discharge because they engaged in union activities and harassing employees by requesting that employees report to Respondent the union activities of other employees.

(f) Threatening its employees with discharge and unspecified reprisals in retaliation for their concertedly filing a lawsuit against Respondent concerning their terms and conditions of employment.

(g) Prohibiting employees from parking in Respondent's parking areas in order to discourage them from distributing prounion handbills.

(h) Threatening employees that they would not be able to address grievances with their supervisors if they selected the Union as their bargaining representative.

(i) Threatening employees with loss of jobs, wages, and benefits if they selected the Union as their bargaining representative.

(j) Creating the impression among its employees that Respondent was engaging in surveillance of their union activities.

(k) Threatening to discharge employees in retaliation for their union activities.

(l) Denying the request of its employee Joaquin Garcia to have a fellow employee present during an investigatory interview when he had reasonable cause to believe that the interview would result in disciplinary action being taken against him.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by issuing warnings to Luis Pacheco on May 3 and 25, 2001, and February 14, 2002, by suspending him on March 14, 2002, and discharging him on March 15, 2002.

6. The above unfair labor practices in connection with the business of the Respondent have the effect of burdening commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in violations of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes and policies of the Act and post the appropriate notice.

It is recommended that Respondent rescind the unlawful warnings and discharge of employee Luis Pacheco and offer him full reinstatement to his prior position or to a substantially equivalent one if his prior position no longer exists. Pacheco shall be made whole for all loss of backpay and benefits sustained by him as a result of the unlawful warnings and his unlawful discharge.

These amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), at the "short term Federal rate" for underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[Recommended Order omitted from publication.]